SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 118

JAMES A. DOMBROWSKI, ET AL.,
PETITIONERS,

vs.

JAMES EASTLAND, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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[fol. A]

Joint Appendix—Filed July 22, 1964

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18435, 18544

JAMES A. DOMBROWSKI and SOUTHERN CONFERENCE EDUCATIONAL FUND, INC., Appellants,

against

COLONEL THOMAS D. BURBANK, individually and as Commanding Officer of the Division of Louisiana State Police, RUSSELL R. WILLIE, individually and as Major of the Louisiana State Police Department, JAMES H. PFISTER, individually and as Chairman of the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, SENATOR JAMES EASTLAND, individually and as Chairman of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate, J. G. SOURWINE, individually and as Committee counsel for the Internal Security Subcommittee of the Judiciary Committee of the United States Senate, the CITY OF NEW ORLEANS and ALLSTATE INSURANCE CO., Appellees.

[File endorsement omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2678-63

JAMES A. DOMBROWSKI and SOUTHERN CONFERENCE EDUCATIONAL FUND, INC., Plaintiffs,

vs.

COLONEL THOMAS D. BURBANK, *et al.*

COMPLAINT—Filed October 31, 1963

The plaintiffs for their verified complaint allege:

Parties

1. James A. Dombrowski is a citizen of the State of Louisiana and of the United States.

2. Southern Conference Educational Fund, Inc. is a corporation organized under the laws of the State of Tennessee maintaining an office for business purposes in the State of Louisiana, whose purpose and function is to secure to Negro citizens the rights guaranteed them under the United States Constitution and to end all forms of segregation in the Southern section of the United States.

3. Defendant Thomas D. Burbank is the Commanding Officer of the Division of State Police for the State of Louisiana. He is sued individually and in his capacity as Commanding Officer of the Louisiana State Police. He is a citizen of the State of Louisiana.

4. Defendant Russell R. Willie is a Major in the Louisiana State Police Department. He is sued individually and in his capacity as Major of Louisiana State Police. He is a citizen of the State of Louisiana.

5. James H. Pfister is a Louisiana State representative and Chairman of the Joint Legislative Committee on [fol. 2] Un-American Activities of the Louisiana Legislature. He is sued individually and in his capacity as Chairman of said Committee. He is a citizen of the State of Louisiana.

6. Senator James Eastland, United States Senator from the State of Mississippi, is Chairman of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate. He is sued individually and in his capacity as Chairman of said Committee. He is a citizen of the State of Mississippi, and a resident of the District of Columbia.

7. J. G. Sourwine is Committee counsel for the Internal Security Sub-Committee of the Judiciary Committee of the United States Senate. He is sued individually and in his capacity as Committee counsel. He is a resident of the District of Columbia.

8. The City of New Orleans is a Municipal Corporation in the State of Louisiana.

9. Allstate Insurance Company is an insurance corporation organized under the laws of a state other than the State of Louisiana, but doing business in the State of Louisiana, and the District of Columbia.

Jurisdiction of the Court

10. The jurisdiction of the Court over this Complaint arises under Title 28 U. S. C. 1331(a), 1343(3), (4), 2201, 2202, and 2281; Title 42 U. S. C. 1981, 1983, 1985, and under the Constitution of the United States, and in particular the First, Fourth, Fifth and Fourteenth Amendments thereto.

11. The amount in controversy, exclusive of interest and costs exceeds the sum or value of $10,000.00.

[fol. 3] The Cause of Action

12. The defendants, Colonel Thomas D. Burbank, Major Russell R. Willie, James H. Pfister, James Eastland and J. G. Sourwine, and the City of New Orleans, through certain below mentioned persons employed by the City of New Orleans as police officers, acting in their official capacities in behalf of the City of New Orleans, entered into a plan, agreement and conspiracy wilfully and with intent with other persons to the plaintiffs now unknown under the color of state law and statutes, to deprive the plaintiffs of the rights, privileges and immunities granted to them as citizens of the United States by the laws and Constitution of the United States, and in particular, the First, Fourth and Fourteenth Amendments thereof.

13. Pursuant to this conspiracy on October 4, 1963, certain police officers of the Police Department of defendant, the City of New Orleans, namely, Major P. J. Trosclair, Captain Henry M. Morris, Sgt. Horace J. Austin, Jr., Sgt. John A. Sarran, Patrolman Kenneth Knapp, Patrolman Bernard Windstein and Patrolman Clinton Lauman, together with certain officers of the Louisiana State Police, Lt. William R. Abadie, Sgt. John F. Short, Patrolman Frank Lee and Eugene Gary, all acting under the direction of the Commanding Officer of the Louisiana State Police Department, and F. B. Alexander, Jr., Staff Director of the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, acting under the direction of and in behalf of defendant, James H. Pfister, forcibly entered the business office of the Southern Conference Educational Fund, Inc. at 822 Perdido Street in the City of New Orleans, and proceeded to search and seize a large quantity of objects and articles belonging to said plaintiff, including all of the books and records of the said corporation, as well as all ledgers, receipts, memoranda, vouchers [fol. 4] and other documents, including pamphlets and literature, and many items of personal property belonging to James A. Dombrowski; that after searching the said

place of business for several hours, and ransacking the office and seizing all articles, items and documents available, James A. Dombrowski was placed under arrest and booked with violation of certain state statutes, particularly Louisiana Revised Statutes 14:358 et seq. and 14:390 et seq.

14. Furthermore, officers of the New Orleans Police Department and of the State Police Department, acting pursuant to the said conspiracy and in behalf of and at the direction of the defendants herein named as members of the said conspiracy, proceeded to search the residence of James A. Dombrowski, 715 Governor Nichols Street in the City of New Orleans, and seized many items of personal property from the said residence, and from the vehicle of James A. Dombrowski located nearby.

15. All of the items, articles and documents seized pursuant to all of the above mentioned searches, were forwarded to the office of the Louisiana State Police Headquarters in Baton Rouge, Louisiana, where they were under the custody of the defendant, Thomas D. Burbank, as Commanding Officer of the Division of State Police, and of defendant James H. Pfister in his capacity as Chairman of the above mentioned State Legislative Committee.

16. As a part of the aforementioned plan and conspiracy the defendants obtained certain arrest warrants and search warrants which purported to authorize the above set forth arrests and searches. These warrants were issued on October 2nd, 1962 by Judge Thomas Brahney, Jr., of the Section "D" of the Criminal District Court for the Parish of Orleans. It was part of the plan and conspiracy to obtain these warrants without any legal and lawful cause. [fol. 5] Pursuant to this plan and conspiracy they were issued without any legal cause and justification so that the defendants might seize the books, records, documents and other articles belonging to the plaintiffs. In further pursuance of the conspiracy defendant Willie, acting under color of his position as Major of the Louisiana State Police,

made various allegations in the affidavits upon which the said warrants were issued, which allegations were false and untrue, and wholly without any probable cause.

17. In pursuance of the conspiracy the arresting officers seized at 822 Perdido Street lists of members, contributors and friends of plaintiff corporation, Southern Conference Educational Fund, Inc. The seizure of said lists was for the purpose of learning the identity of said members, contributors and friends, for the purpose of harassment and intimidation and to deter these people, the plaintiff and the plaintiff corporation from exercising their constitutional rights.

18. No affidavit or other criminal proceedings were ever initiated against plaintiff Dombrowski, but on October 25, 1963, upon motion of plaintiff for a preliminary hearing Judge J. Bernard Cocke, of Section "E" of the Criminal District Court for the Parish of Orleans, after hearing evidence, immediately and summarily discharged the plaintiff and held that there had been no probable cause shown for the issuance of the warrants of arrest. He therefore discharged the plaintiff. Accordingly the arrest of the plaintiff was illegal, null and void in violation of the Fourth Amendment and Fourteenth Amendment to the Constitution of the United States and the searches and seizures of plaintiffs' property were likewise illegal and unsupported by valid warrants issued upon probable cause, in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States of America.

[fol. 6] 19. In pursuance of the conspiracy within twenty-four hours of the said seizure of the various documents, objects and articles, as above set forth, the defendants Eastland and Sourwine caused a subpoena duces tecum purporting to be under the authority of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate, to be directed to defendants James H. Pfister and Thomas D. Burbank, ordering and directing the said de-

fendants to produce all of the said documents, objects and articles at the offices of the said Subcommittee of the United States Senate in Washington, D. C. on October 29, 1963.

20. Plaintiffs allege on information and belief that the issuance of the said subpoena, purporting to require production of the illegally seized documents before defendant Eastland and his Committee is part of the above described conspiracy, and is in furtherance of the object of the conspiracy to deprive plaintiffs of their constitutional rights; that the purpose of the conspiracy, among others, was to avoid the decisions of the United States Supreme Court prohibiting the enforced production of membership lists of organizations seeking enforcement of minority rights and guarantees of the equal protection clause of the United States Constitution; that the entire operation consisting of search, seizure and arrest of the plaintiff, and issuance of the subpoena as above set forth, was for the purpose of obtaining the books, records and membership lists of plaintiffs, in violation of the laws, statutes and Constitution of the United States.

21. The use of any of the documents, objects or articles so seized in any manner, by any person acting under color of state or federal authority would violate the constitutional rights of plaintiffs and in particular the rights guaranteed by the Fourth and Fourteenth Amendments of the United States Constitution in that the said documents, ob-
[fol. 7] jects or articles are the fruit of an illegal search and seizure perpetrated for the purpose of securing membership lists and other documents and information in defiance of the United States Constitution.

22. In further pursuance of this conspiracy defendants Burbank, Willie and Pfister, at the request of defendants Eastland and Sourwine secretly and surreptitiously, without warrant or authority of law, transferred a portion of said books, records, documents and other articles belonging to the plaintiffs out of the jurisdiction of the

United States District Court for the Eastern District of Louisiana. Plaintiffs had instituted in that Court a proceeding under appropriate federal statutes to obtain the return of said documents and articles, and to receive appropriate redress under the law for the illegal acts of the defendant conspirators. In order to evade the jurisdiction of that Court, the defendants caused to be transferred a portion of the said documents, records and other articles to the District of Columbia. Upon information and belief said documents, articles and records are presently in the possession of defendants Eastland and Sourwine in the District of Columbia. Other documents and records, all belonging to the plaintiffs, illegally and in violation of the Constitution of the United States seized from them, were also secretly and surreptitiously transferred to a State Court House in the State of Mississippi, and are presently in the possession of defendant Eastland.

23. That the arrest of plaintiff James A. Dombrowski, and the search of his office, residence and automobile, all without lawful authority, caused to said plaintiff intense mental and emotional pain and suffering, embarrassment and humiliation, as did the attendant and resultant publicity caused thereby.

24. Defendant, Allstate Insurance Company, has issued to the City of New Orleans a policy of liability in-
[fol. 8] surance purporting to insure the said municipal corporation against legal liability resulting from delict on the part of any of its agents, servants, employees, including the police officers named herein, as well as others acting in behalf of defendant municipal corporation in the transactions above described; that the said policy of insurance was in full force and effect on October 4, 1963, and at all times pertinent herein.

25. Plaintiff Dombrowski seeks damages herein for the false arrest, the search of his office, home and automobile and the seizure of his personal and business papers and

documents and other objects and articles, and for the humiliation and embarrassment and mental and emotional pain and suffering caused thereby in the full sum of $250,000.00 against defendants Burbank, Pfister, Willie, Eastland, Sourwine, the City of New Orleans and Allstate Insurance Company, jointly and in solido.

26. Plaintiff Southern Conference Educational Fund, Inc., seeks damages herein for the illegal search of its office and the illegal seizure of books, records, documents and other articles belonging to it in the full sum of $250,000.00 against defendants Burbank, Pfister, Willie, Eastland, Sourwine, the City of New Orleans and Allstate Insurance Company, jointly and in solido.

27. The various documents, books, records, files, articles and objects seized from the plaintiffs are vital in the operation of their business affairs. Plaintiffs will suffer irreparable injury unless the said documents, articles and objects are returned forthwith.

The defendants are threatening to and continue to threaten to utilize the said documents, papers, lists, and other articles all of which were illegally seized from the [fol. 9] plaintiffs, for the purpose of harassing the plaintiffs and the members of the plaintiff corporation in their exercise of their rights under the First and Fourteenth Amendments to the Constitution of the United States. In particular the defendants threaten and continue to threaten to utilize this illegally seized material to intimidate and deter the plaintiffs and the members of the plaintiff corporation from utilizing rights guaranteed to them under the Constitution of the United States in their efforts to secure the implementation of the guarantees of the equal protection clause of the Fourteenth Amendment.

Unless this Court grants the relief prayed for the plaintiffs and the members of the plaintiff corporation will suffer immediate and irreparable injury in that the defendants will seek to utilize this seized material in attempts

to deter, frighten and intimidate them from exercising rights guaranteed by the First and Fourteenth Amendments.

Unless this Court grants the relief prayed for the members of the plaintiff corporation, its friends, supporters and contributors will be subject to continual harassment, intimidation and deterrence of the exercise of their constitutional rights under the First and Fourteenth Amendments to the Constitution of the United States.

28. Plaintiffs have no adequate remedy at law with respect to their rights in the illegally seized property.

29. There has been no previous application for this relief.

Wherefore, plaintiffs pray for the following relief:

(1) That a permanent injunction issue, restraining the defendants, their agents and all persons acting in concert with them from using in any manner whatsoever any of [fol. 10] the various documents, books, records or other objects seized by them or by any of them on or about Ootober 4th, 1963, or from using in any manner whatsoever any photographs, photocopies, or any other copies which may have been made by them at any time following the seizure of the said objects, and ordering the defendants and each of them to return to the plaintiffs any copies, photocopies, or copies by any other process of the said documents, books, records, articles and objects which they may have procured, and ordering the defendants to return to the plaintiffs all of the documents, books, records, or other objects which were seized from the plaintiffs on or about October 4th, 1963.

(2) That judgment be entered in favor of plaintiff Dombrowski against the defendants jointly and in solido in the sum of $250,000.00 together with legal interest thereon and for all costs of these proceedings, and

(3) That judgment be entered in favor of plaintiff Southern Conference Educational Fund, Inc., against the defendants jointly and in solido in the sum of $250,000.00 together with legal interest thereon and for all costs of these proceedings, and

(4) That an interlocutory injunction and order be issued restraining the defendants, their agents, their attorneys and all others acting in concert with them, pending the hearing and determination of the prayer for permanent relief from

(a) using in any manner whatsoever any of the various documents, books, records or other objects seized by them or by any of them on or about October 4th, 1963, or from using in any manner whatsoever any photographs, photocopies, or any other copies which may have been made by them at any time following the seizure of the said objects, and [fol. 11] ordering the defendants and each of them to return to the plaintiffs any copies, photocopies, or copies by any other process of the said documents, books, records, articles and objects which they may have procured, and

(b) that an order be entered directing that the defendants forthwith produce and deposit with the Clerk of this Court all of the various documents, books, records or other objects seized by them from the plaintiffs on or about October 4th, 1963 and that these documents, books, records or other objects be held in the custody of the Clerk of this Court until the hearing and determination of the prayer for permanent relief,

And for such other relief as may to this Court be deemed just and proper—

Plaintiffs respectfully pray that the above relief be granted.

Plaintiffs by their Attorneys;
Kunstler Kunstler & Kinoy, 511 Fifth Avenue, New York 17, N. Y., by Arthur Kinoy, Michael J. Kunstler, William M. Kunstler;

Milton E. Brener, 1304 National Bank of Commerce Bldg., New Orleans 13, Louisiana;

William M. Kunstler, 1101 Vermont Avenue, N.W., Washington, D. C.;

Dillon and Dillon, 1625 I St. N. W., Washington, D. C.

[fol. 12] IN UNITED STATES DISTRICT COURT

OPINION OF THE COURT

The Court: This is an action against Senator Eastland, the Chairman of the Senate Judiciary Committee, J. G. Sourwine, the counsel of one of the subcommittees of that Committee, and numerous other defendants. Only Senator Eastland and Mr. Sourwine have been served with process. The other defendants have not been served and have not appeared and consequently they are not before the Court.

The action has two aspects insofar as the two defendants who have appeared are concerned. First, it seeks an injunction against the reproduction and use of certain documents that have come into the possession of the Senate Judiciary Committee. Second, it seeks money damages. Although in form only one count is set forth, actually there are two claims for relief or two causes of action, which for the sake of clarity should be set forth as two separate counts.

The plaintiff has moved for a preliminary injunction against the two defendants who have appeared and now seeks to withdraw that motion, stating, however, that it desires to renew it if it can secure additional evidence which

it proposed to do, in part at least, by taking the deposition of one of the defendants.

Counsel for the two defendants contends that the cause of action for an injunction does not set forth a valid claim for relief and that under no set of circumstances that could be proven thereunder could the plaintiff prevail and counsel for the two defendants accordingly ask the Court to dismiss that cause of action as to them at this time.

This procedure has been approved by the Supreme Court in Mast Foos & Company v. Stover Manufacturing Company, 177 U. S. 485, 495.

This case involves the basic principle of constitutional law of separation of power. Sometimes we tend, amidst dealing with numerous details, to forget the basic principles of law and it is useful occasionally to refresh ourselves at the fountain of the basic principles.

[fol. 13] It is elementary that our Federal Government is divided into three coordinate branches. No one of the three may interfere with the activities of either of the other two except in the limited matters as provided by other provisions of the Constitution. Consequently, this Court may not enjoin a Congressional committee from pursuing its activities.

If any authority is needed to support this elementary principle the Court may refer to Hearst v. Black, 66 App. D. C. 313, in which in an opinion written by Judge Groner the Court of Appeals for this jurisdiction held that a Senate committee could not be enjoined from making use of certain telegrams which had come into its possession and which it was claimed by the plaintiff had been seized illegally.

In Methodist Federation For Social Action v. Eastland, 141 F. Supp. 729, a Three-Judge Court in this District, in an opinion written by Circuit Judge Edgerton, held that the courts could not enjoin a subcommittee of the Senate Committee on the Judiciary from printing and circulating a pamphlet. In this case Judge Edgerton made this significant statement:

"We have no more authority to prevent Congress or a committee or public officer acting at the express direction of Congress from publishing a document than to prevent them from publishing the Congressional Record. If it unfortunately happens that a document which Congress has ordered published contains statements that are erroneous and defamatory and are made without allowing the persons affected an opportunity to be heard, this adds nothing to our authority. Only Congress can deal with such a problem. The Constitutional history called to our attention includes no instance in which an English court has attempted to restrain Parliament or an American court to restrain Congress from publishing any statement. This history therefore tends to confirm our view."

[fol. 14] In the light of this discussion the Court will dismiss as to defendants Senator Eastland and Mr. Sourwine the alleged claim for an injunction.

You may submit an order accordingly.

IN UNITED STATES DISTRICT COURT

ORDER—December 18, 1963

This cause having come on for hearing upon plaintiffs' motion for a preliminary injunction to enjoin defendants Senator James O. Eastland, Chairman of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate, and J. G. Sourwine, Counsel for the Subcommittee, from making use of certain documents and records, or copies thereof, presently in the custody and possession of the Subcommittee, and upon consideration of the motion, the opposition thereto, the complaint filed herein and argument of counsel in open court, and it appearing to the court that plaintiff's claims for injunctive relief as set

forth in their motion for preliminary injunction and complaint are invalid on their face in that the granting of such relief by this court would contravene the constitutional requirement of separation of powers and would exceed the jurisdiction of this court, it is by the court this 18th day of December, 1963

Ordered and decreed that plaintiffs' motion for preliminary injunction be and the same hereby is denied; and it is

Further ordered and decreed that so much of plaintiffs' complaint which seeks permanent injunctive relief against these defendants be and the same hereby is dismissed.

The oral opinion delivered by the Court shall constitute the findings of fact and conclusions of law herein.

[fol. 15]

IN UNITED STATES DISTRICT COURT

MOTION OF DEFENDANTS EASTLAND AND SOURWINE TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT—Filed January 28, 1964

Come now the defendants James O. Eastland, United States Senator from Mississippi and Chairman of the Committee on the Judiciary of the United States Senate and of the Subcommittee on Internal Security of that Committee, and J. G. Sourwine, Chief Counsel, Internal Security Subcommittee of the Committee on the Judiciary of the United States Senate by their counsel and move the Court to dismiss the complaint as to them for failure to state a claim upon which relief can be granted.

Alternatively, the defendants move for summary judgment for the reason that the affidavits filed herewith and made part hereof, and the deposition of J. G. Sourwine on file in this cause, show there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law.

Defendants incorporate herein and as part hereof their affidavits earlier filed with the Court as part of their op-

position to plaintiffs' motion for a preliminary injunction, photocopies of which are attached for the convenience of the Court.

Also incorporated herein and made part hereof are the following affidavits which will be identified as Exhibits:

1. Affidavit of James H. Pfister, Chairman of the Joint Legislative Committee on Un-American Activities for the State of Louisiana, executed on January 4, 1964, and House Concurrent Resolution No. 13, Regular Session, 1960, marked as Exhibit A to the affidavit ..... Exhibit 1

[fol. 16]

2. Affidavit of Jack N. Rogers, member of the bar of the State of Louisiana, and of the Supreme Court of the United States, and Counsel for the Joint Legislative Committee on Un-American Activities of the State of Louisiana, executed on January 25, 1964 ..... Exhibit 2

3. Affidavit of Thomas D. Burbank, Director of Public Safety and Superintendent of State Police of the State of Louisiana, executed on January 3, 1964 ..... Exhibit 3

4. Affidavit of Major Russell R. Willie, Supervisor of Bureau of Identification, State Police of the State of Louisiana, executed on January 3, 1964 ..... Exhibit 4

5. Affidavit of Mrs. Laura Nicholson, Employee and Secretary, Joint Legislative Committee on Un-American Activities of the State of Louisiana, executed on January 3, 1964 ..... Exhibit 5

6. Affidavit of Senator James O. Eastland, executed on December 4, 1963 will be referred to as ..... Exhibit 6

7. The affidavit of J. G. Sourwine, executed on December 4, 1963 will be referred to as ..... Exhibit 7

David C. Acheson, United States Attorney; Joseph M. Hannon, Assistant United States Attorney.

Of Counsel: Roger Robb.

[fol. 17]

IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION OF DEFENDANTS EASTLAND AND SOURWINE FOR SUMMARY JUDGMENT—March 26, 1964

This cause having come on for hearing upon the motion of the defendants James O. Eastland and J. G. Sourwine to dismiss, or in the alternative for summary judgment, and upon consideration of said motions, the memoranda of points and authorities, the exhibits and affidavits in support thereof and in opposition thereto, and upon consideration of oral arguments of counsel for the parties made in open court, and it appearing to the court that there exists no genuine issue of material fact and that said defendants are entitled to judgment as a matter of law, it is by the Court this day of March 1964,

Ordered that summary judgment be and the same hereby is granted for the defendants, Eastland and Sourwine, and it is

Further ordered that the action be and thesame hereby is dismissed.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed April 3, 1964

Further Ordered that the action be and the same hereby Southern Conference Educational Fund, Inc. plaintiffs

above named, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the order granting summary judgment for defendants entered in this action on the day of March, 1964.

Walter E. Dillon, Jr., Attorney for Appellants, 1625 Eye Street, N.W.

[fol. 18]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JAMES A. DOMBROWSKI, IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

State of Louisiana,
Parish of Orleans, ss.:

Before Me, the undersigned authority, duly commissioned and qualified in and for the Parish and State first above written,

Personally Came and Appeared: James A. Dombrowski, who, after being first duly sworn, deposed and said:

That on October 4, 1963, officers of the New Orleans Police Department and the Louisiana State Police Department forcibly entered the office of the Southern Conference Educational Fund, Inc. at 822 Perdido Street in this City and the residence of appear [sic] at 715 Governor Nicholas Street in New Orleans, and his automobile located nearby, and that the said officers seized in the course of each of these searches, quantities of books, records, files, documents, articles and objects and retained them in their, the police, custody; that many of these documents, books, records, files, documents, articles and objects are vital to the normal every day operation of the business of the Southern Conference Educational Fund, Inc., of which appearer, James A. Dombrowski, is Managing Director, and that the return of these various documents, books, and records, etc. is vital therefor; that appearer will suffer irreparable in-

jury unless the defendants in these proceedings are enjoined and restrained immediately from disposing of the said documents, etc., or surrendering their possession to other persons, and unless the said documents, etc., are returned forthwith.

James A. Dombrowski

[fol. 19]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF MILTON E. BRENER, IN SUPPORT OF MOTION FOR TEMPORARY INJUNCTION

State of Louisiana,
Parish of Orleans, ss.:

Before Me, the undersigned authority, duly commissioned and qualified in and for the Parish and State first above written,

Personally Came and Appeared: Milton E. Brener, who, after being first duly sworn, deposed and said:

That he is one of the attorneys herein; that following the arrest and booking of James A. Dombrowski, Benjamin E. Smith and Bruce Waltzer on October 4, 1963, with violation of the Louisiana Revised Statute 14:358 et seq. and 14:390 et seq. no criminal charges were lodged in the Criminal District Court for the Parish of Orleans which has jurisdiction over the alleged offenses; that no affidavit was filed by any arresting officers or any other persons, nor was there any bill of information filed or indictment returned; that on motion of petitioners a preliminary hearing was held before the Honorable J. Bernard Cocke, Judge of Section "E" of the said Criminal District Court, for the purpose of determining whether the State had probable cause for the arrest of these petitioners, and to further determine whether said petitioners should be bound over for trial or whether they should be discharged; that after hear-

ing evidence adduced by the State the Court summarily and immediately ordered the said Dombrowski, Smith and Waltzer discharged holding that no probable cause existed as a legal basis for the arrest of any of the said three petitioners.

Milton E. Brener

[fol. 20]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JAMES A. DOMBROWSKI, IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

State of Louisiana,
Parish of Orleans, ss.:

Before Me, the undersigned authority, duly qualified and commissioned in and for the Parish and State first above written,

Personally Came and Appeared: Dr. James A. Dombrowski who, after being first duly sworn, declared as follows:

I am a graduate of Union Theological Seminary in New York City where I have served in the past as Instructor. I am also a Doctor of Philosophy in philosophy. I have served as the Executive Director of Southern Conference Educational Fund Inc. since its inception in 1946. The sole purpose of this organization is the elimination of segregation and all forms of discrimination based on race in the South through education and other non-violent methods. My sole interest in political action is likewise in the field of Civil Rights, and my aims and purposes in that regard are identical to the expressed aims and purposes of the Southern Conference Educational Fund. SCEF is not, and has never been a communist or subversive organization. I am not and have never been a communist or a subversive. My own activity and the activity of SCEF is lawful and neither I, nor this organization are, or have

been engaged in any unlawful or illegal activity, nor have I or SCEF violated any of the provisions of R. S. 14:358 et seq. or 14:390 et seq.

The activities of myself and SCEF are not secret, nor is there anything secretive about the operation of SCEF, or my own functions therein. On the contrary, it is our purpose to obtain as wide an audience to our advocacy in behalf of Civil Rights as is possible. SCEF publishes con- [fol. 21] siderable quantities of literature in the field of Civil Rights, all of which is available to the public, including all defendants in this case. In addition, SCEF publishes a monthly newspaper entitled "The Southern Patriot" for the purpose of advancing the cause of SCEF. One or more of the defendants, or others acting in their behalf, subscribe to "The Southern Patriot", and the defendants have thus had access to all material published in this newspaper for a considerable period of time. Nothing subversive or communist in nature has ever been published by SCEF either in "The Southern Patriot" or in any of the other literature.

On October 4, 1963, at about 3:00 P.M. a large moving van was driven up to the entrance of the office of SCEF at 822 Perdido Street accompanied by five officers of the Louisiana State Police, assisted by approximately seven New Orleans Police Officers and Col. F. B. Alexander, Jr., the Staff Director of the Joint Legislative Committee. In addition, there were about twenty trustees from the House of Detention in green fatigue uniforms. These trustees were lined up in the hallway of the building at 822 Perdido Street. The officers forcibly entered the offices and proceeded to break open one of the doors near by with sledge hammers and pick-ax. This was done under the mistaken impression that it was the door to the office of the SCEF. The raid continued for approximately four hours, during which time the office was completely ransacked and almost literally cleaned out. One of the officers took my crutches, dismantled them and inspected the insides. The block was soon filled with many curious onlookers, photographers

and reporters. I was placed under arrest and confined in the District Station. Some of the officers involved proceeded to my home where only my wife was present and likewise ransacked my home at 715 Governor Nichols Street. They likewise searched my automobile located nearby.

[fol. 22] I have read the applications for search warrants of the office, my home and car and for my arrest warrant, as well as the warrants themselves, as well as the affidavits filed in this case.

The statement in the application for the search of 822 Perdido Street that "The Southern Conference Educational Fund is a 'subversive organization' as defined in R. S. 14:358 et seq. and is being knowingly operated as such by James Dombrowski in violation of said statute," is an untrue allegation. SCEF is not subversive and is not being operated as such by me or anyone else, nor has it ever been cited as such by any official body. To my knowledge no communist has frequented these premises or done business with me on the premises or anywhere else. There was no communist political propaganda on the premises nor has there ever been. The statement in the applications as well as in the affidavits filed in this case that I have been identified twice in sworn testimony as a communist fails to include the significant facts that these alleged identifications were made in 1954, and by witnesses not subject to cross-examination, both of whom were completely discredited and proven to have committed perjury. The "sworn testimony" was immediately challenged by me under oath as an untruth in the presence of the two individuals who made the charges. No charges of perjury were brought either against me or my accusers.

The statements in the affidavits filed in this case that SCEF has been cited as a communist front organization is likewise not correct. Despite the testimony of the two individuals, one of whom accused me of being a communist, and the other who accused me of "seeming" to be

a communist, the Eastland Committee in its report in 1955 did not cite SCEF as a subversive organization or as a communist front organization. Whatever the committee may have found to be the case, the report did not cite SCEF as subversive or as a communist front.

[fol. 23] The application for the search of my vehicle, likewise signed by Willie, states falsely that SCEF is a subversive organization. It also contains the allegation that I am an "identified communist" which is untrue by virtue of the misrepresentations and omissions above mentioned.

The same misrepresentations and omissions are set forth in the application for the search of my home and in the application of my arrest warrant. The latter untruthfully states that I entered into a conspiracy to violate 14:358 et seq. and that I was guilty of distributing and storing communist propaganda.

I note that all of the warrants, that for the search of my office, my home and my automobile, authorized the seizure of "books, records, and files of the Southern Conference Educational Fund, Inc. and James A. Dombrowski, plus any communist political propaganda and communist party records." Tremendous quantities of materials were seized which were not described even by the terms of the warrants. Included among such materials were approximately $100 in postage stamps, approximately 1500 to 2000 books and pamphlets including many from my personal library on literature, philosophy, religion and sociology, the pictures from the office wall including a photograph inscribed by Mrs. Eleanor Roosevelt, and the complete inventory of thousands of pamphlets, brochures and other literature concerning integration, and several thousand blank receipt forms and blank stationery and letterheads. A more complete description of part of the property seized is as follows:

1. A four-drawer iron file, letter-size, containing all the corporation correspondence relating to finance Board of Directors (about 100 individual file folders of board members);

2. A four-drawer iron file similar to the one listed above containing correspondence with individuals, [fol. 24] staff members, organizations; material on special projects sponsored by the Fund.

3. A four-drawer wooden file, letter-size, containing a file of clippings on integration, some corporation correspondence on current projects; personal papers of James A. Dombrowski including a folder with certain corporate certificates.

4. Several transfer files containing corporate records and correspondence. Number of files not certain, perhaps four to six.

5. Wooden library index file containing about 16 to 20 thousand 3x5 cards.

6. Library of about 1500 to 2000 (est.) books and pamphlets, primarily on integration but including many books from my personal library on literature, philosophy, religion, sociology, etc.

7. Contents of my desk as well as the contents of two additional desks and everything on a large work table. From my desk, my personal check book containing some checks drawn to my name, all of my personal bank statements and other personal property.

8. Financial records of the corporation including cash book, ledger, journal, auditors' reports, cancelled checks and bank statements.

9. A file of "The Southern Patriot" for 21 years.

10. Photographs illustrating the southern integration movement over a period of about 20 years, largely from "The Southern Patriot" file.

11. Pictures from my office wall, including a photograph inscribed to me by Mrs. Eleanor Roosevelt, a [fol. 25] letter from Franklin D. Roosevelt to Dr. Frank Graham, president of the Southern Conference for Human Welfare; a letter to me from Albert Einstein; a photograph inscribed to me from Mrs. Mary McLeod Bethune; photograph inscribed of Aubrey W. Williams and friend; a framed award to "The Southern Patriot" by the School of Journalism of Lincoln University;

12. Three posters from my office wall: one a full page ad from an Atlanta paper by the Committee on Appeal for Human Rights; a poster in color WE SHALL OVERCOME from the March on Washington for Jobs & Freedom; and a full page ad from the "New York Times" entitled "Love, the Greatest thing in the World."

13. Contents of a storeroom including records, several thousand sheets of blank stationery, letterheads, bond paper, etc., probably five to ten thousand blank receipts, numbered and printed in duplicate and triplicate, also various forms; probably 5M to 10M pamphlets, brochures, etc.

14. Mailing list of "The Southern Patriot" about 10,000 names.

The entire mass of articles seized constituted about 75 or 76 large cartons of evidence and completely filled the huge truck which was used to transport the seized material. None of the seized material consisted of communist or subversive propaganda, nor did any of it contain any evidence of communism or subversion. I have been informed that 27 cartons of evidence have been returned and are being held in the District Attorney's Office and that I am entitled to pick up these cartons. On the advice of my attorney, I am refusing to do so at this time.

James A. Dombrowski

[fol. 26]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF BENJAMIN E. SMITH, IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

State of Louisiana,
Parish of Orleans, ss.:

Before Me, the undersigned authority, duly qualified and commissioned in and for the Parish and State first above written,

Personally Came and Appeared: Benjamin E. Smith, who, after being first duly sworn, declared as follows:

I am a practicing attorney-at-law in the City of New Orleans, and a member of The Southern Conference Educational Fund, Inc. I am presently serving as Treasurer of that organization. The sole purpose of this organization is the elimination of segregation and all forms of discrimination based on race in the South through education and other non-violent methods. My sole interest in political action is likewise in the field of Civil Rights, and my aims and purposes in that regard are identical to the expressed aims and purposes of the Southern Conference Educational Fund. SCEF is not, and has never been a communist or subversive organization. I am not and have never been a communist or a subversive. My own activity and the activity of SCEF is lawful and neither I, nor this organization are, or have been engaged in any unlawful or illegal activity, nor have I or SCEF violated any of the provisions of R. S. 14:358 et seq. or 14:390 et seq.

The activities of myself and SCEF are not secret, nor is there anything secretive about the operation of SCEF, or my own functions therein. On the contrary, it is our purpose to obtain as wide an audience to our advocacy in behalf of Civil Rights as is possible. SCEF publishes considerable quantities of literature in the field of Civil Rights, all of which is available to the public, including all defen-

dants in this case. In addition, SCEF publishes a monthly [fol. 27] newspaper entitled "The Southern Patriot" for the purpose of advancing the cause of SCEF. One or more of the defendants, or others acting in their behalf, subscribe to "The Southern Patriot" and the defendants have thus had access to all material published in this newspaper for a considerable period of time. Nothing subversive or communist in nature has ever been published by SCEF either in "The Southern Patriot" or in any of the other literature.

I represented Dr. Dombrowski when he appeared before the Internal Security Subcommittee during the course of its hearing in New Orleans, La., in March of 1954. Dr. Dombrowski answered all questions placed to him by the committee except those concerning the identity of contributors. He denied under oath that he was a communist or that he had ever been. In the presence of the two individuals who accused him of being either a communist or under communist control, Dr. Dombrowski accused these witnesses of testifying untruthfully. I was denied any right to cross-examine either of the accusing witnesses. Dr. Dombrowski has never been charged with having committed perjury during the course of his testimony. The report of the committee was published in 1955 and stated in pertinent part as follows:

> "The Southern Conference Educational Fund, Inc. was initially an adjunct of the Southern Conference for Human Welfare. After the exposure of the Southern Conference for Human Welfare as a Communist front, it began to wither and was finally dissolved, but the Southern Conference Educational Fund, Inc. continued. The official paper, the *Southern Patriot,* which was published by the Southern Conference for Human Welfare, was taken over by the Southern Conference Educational Fund, Inc., which professes the same ostensible purpose.
>
> [fol. 28] "Dr. James A. Dombrowski was identified as executive director of the Southern Conference Edu-

cational Fund, Inc., who, immediately prior to this assumption of his present office, had been administrator of the Southern Conference for Human Welfare. Dr. Dombrowski was identified by a witness as one who, to the witness' certain knowledge, had been a member of the Communist Party. He was also identified by another witness as one who had accepted Communist Party discipline."

On October 4, 1963, my law office and my home and automobile were raided and ransacked by a number of State Police Officers assisted by certain local policemen. I was arrested pursuant to a warrant of arrest and charged with violation of R. S. 14:358 and 14:390 et seq. Arrested at the same time was James Dombrowski. I have worked in close association for the past six years with Dr. Dombrowski and he has never, to my knowledge, advanced the cause of communism, nor is he a communist or a subversive. Nor was he acting in violation of any law of the State of Louisiana including 14:358 and 14:390 et seq. to my knowledge.

Dr. Dombrowski and I, along with Bruce Waltzer, my law partner, were paroled shortly after the arrest. No formal charges were ever lodged against us for violation of the statutes with which we were booked. However, on October 25, 1963, on motion of Dombrowski, Waltzer and myself, a preliminary hearing was held in Section "E" of the Criminal District Court for the Parish of Orleans to inquire into the validity of the arrest. Testimony was given by the defendant in this case, Russell Willie, and by Jack Rogers, attorney for the Joint Legislative Committee. At the conclusion of the hearing, the three of us were discharged on the grounds that the arrest warrants were improvidently issued and the arrests illegal.

[fol. 29] Because we had learned during the course of the hearing that the Internal Security Sub-Committee of the Judiciary Committee of the United States Senate was [sic] subpoenaed all of the documents seized from our

respective homes and offices, and that the subpoenas were returnable on the 29th of October, we filed on October 27th a complaint in the Federal District Court seeking an injunction to prohibit the removal of the various articles and objects and documents from the State. Our request for a temporary restraining order to this effect was submitted to the Honorable Judge Robert Ainsworth on the morning of Sunday, October 27, 1963. We were subsequently advised through the Clerk of the Federal District Court on the afternoon of October 27, 1963, that Judge Ainsworth had spoken either with Col. Burbank, the defendant herein, or with his representative, and had been assured that all of the seized material was still at the State Police Headquarters in Baton Rouge. On instructions from Judge Ainsworth to notify the other parties to be present in his office at 9:00 A. M. on the morning of Monday, October 28, 1963, for the purpose of discussing the requests for a temporary restraining order, telegrams were sent to all defendants, including Burbank and Willie. We were subsequently advised that the defendants could not appear by 9:00 A. M. on the morning of Monday, the 28th, and that the conference was being rescheduled for 12:00 Noon on the same day. At the start of the conference at 12:00 Noon all persons present in the office of Judge Ainsworth were advised that all of the seized materials had been removed from the State and delivered to Woodville, Mississippi. A telegram was exhibited from J. G. Sourwine, the attorney for the Internal Security Sub-Committee which had been dated the 27th of October, 1963, at 11:43 P. M. This telegram allegedly required the removal of the documents to Woodville. We were furnished with copies of the Sourwine telegram, and a letter dated October 5, 1963, [fol. 30] addressed to Col. Burbank by Mr. Sourwine wherein Col. Burbank was alleged to have agreed to act as temporary custodian of all of the documents.

Benjamin E. Smith

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF ARTHUR KINOY, SWORN TO FEBRUARY 18, 1964, IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

State of New York,
County of New York, ss.:

Arthur Kinoy, being duly sworn, deposes and says:

1. I am one of the counsel in the above-entitled action. I make this affidavit in support of plaintiffs' Points and Authorities and Answer to Defendants' Motion to Dismiss or in the Alternative for Summary Judgment.

2. I attach hereto as Exhibit "A" and make a part hereof, a clipping which appeared in the *New Orleans Times Picayune* on February 6, 1964. The information contained in this news item was brought to the attention of counsel for the plaintiffs on Friday, February 7, 1964. This information was received, accordingly, after the filing of defendant's motion to dismiss or in the alternative for summary judgment.

As stated in the Points and Authorities and Answer to Defendants' Motion, counsel for the plaintiffs proposes to pursue this matter through the normal and tested procedures of litigation. Counsel cannot here assert to the Court that the information contained in the news story is either accurate or complete. However, counsel suggests that any determination of the motion for summary judgment would require the exploration of this question through [fol. 31] the procedures of litigation either by affidavit or deposition. The information contained in the article, if true, relates materially to the assertion of fact of the defendants that their actions were in some way authorized by the Internal Security Subcommittee of the Senate. The information contained in the *Times Picayune* news story, if true, would further indicate to the Court the presence of a serious and sharply disputed material issue of fact which would require the denial of any motion for summary judgment.

Furthermore, under Rule 56, Subdivision (f) of the Federal Rules of Civil Procedure, upon the facts stated in this affidavit the Court may deem it appropriate to refuse the application for judgment, or "order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had". See Rule 56 (f), Federal Rules of Civil Procedure.

Arthur Kinoy

IN UNITED STATES DISTRICT COURT

EXHIBIT "A", ANNEXED TO FOREGOING AFFIDAVIT

COPYING OF SCEF RECORDS IS HIT

KEATING PROTEST SENATE UNITS MOVE

Sen. Kenneth B. Keating (R-N. Y.), a member of the Senate Internal Security Subcommittee, has protested the subcommittee's subpoena of records of the Southern Conference Educational Fund.

Records of the New Orleans based group were first seized last Oct. 4 at the request of the Louisiana Joint Legislative Committee on Un-American Activities.

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Sen. Keating was absent Nov. 14 when the Senate subcommittee approved a resolution authorizing the copying [fol. 32] of SCEF records. Monday, he expressed "grave concern" and said no such action should be taken in the future without full discussion of the subcommittee.

His statement was made in a letter to subcommittee chairman James O. Eastland (D-Miss.).

He asked Sen. Eastland what legislative purpose the subpoena had. He said he opposed the federal subpoena of records in cases before state courts.

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[fol. 36] IN UNITED STATES DISTRICT COURT

EXCERPT FROM SOURWINE DEPOSITION

Q. [Mr. Brener] How many subpoenas were actually served on that day by your Committee, I mean, by you?

A. [Mr. Sourwine] I think five.

Q. Did you bring the forms with you?

A. Yes, I took the subpoena forms with me.

Q. Blank?

A. Signed by Senator Eastland in blank, subject to being filled in in accordance with his instructions and then I had them filled in down there. I caused them to be filled in down there.

Q. When did Senator Eastland sign them, do you know?

A. No, I do not know when the Senator had signed them. I simply took them from the file when I left.

Q. In other words, he has, as a routine matter, subpoenas signed in blank, is that correct, to which you have access?

A. I do not know what he has.

Q. You have?

A. There is locked up in the Committee offices a folder which contains a number of subpoenas signed by the Senator in blank. These are papers, of course, of no force and effect until they are filled in and served, and if filled in and served in accordance with the Senator's instructions, they become his subpoena, the subpoena of the Committee.

Q. Who actually filled in the subpoena?

A. A young lady, whose name I do not recall, who is or was, at the time, secretary to Mr. Jack Rogers. I had asked where and how I might get clerical assistance. Mr. Rogers said he would call his secretary in.

Q. So this was the secretary to Jack Rogers?

A. That is correct. He did call her in and placed her at my disposal, and she did several hours' work for me.

Mr. Robb: This was a Saturday, was it?

The Witness: Yes, it was. I think that is the day you cannot even get a shave or a haircut in New Orleans.

[fol. 37] Mr. Robb: What was that date, for the record?

The Witness: This was the 5th of October.

By Mr. Brener:

Q. You are aware of the fact that the date of the subpoenas is the 4th of October, are you not?

A. I am aware that the date on the subpoenas is erroneous in that record; yes, sir.

Q. It was a typographical error?

A. I assume it was a typographical error. Basically it was my error in failing to catch it before I left the subpoenas go out, before I served them. The young lady filled them in. I did not instruct her to date them the 4th. I assumed they were dated the 5th.

I was sufficiently careless to let them go out that way. They were, in fact, filled in pursuant to my dictation on the 5th and as internal evidence to that, I call attention to the fact that our subpoenas were in the language of the subpoenas used by the Louisiana Committee in obtaining this material from the police and I deliberately used this device as the best way to cover just what they had gotten and to get it all.

And I could not have had that language until I got down there and saw the subpoenas.

Q. The subpoenas are made returnable on October 29, 1963. Do you recall that?

A. Yes, I believe that is right.

Q. Was that for any particular reason that you chose that date?

A. It was a date far enough ahead to allow time for transportation of records, if there had been any problem about that. It was a week day. I do not know of any other special reason.

Q. You appointed Colonel Burbank, the Commanding Officer of the Louisiana State Police, as custodian, did you not?

A. I did. Appointed is perhaps a strong word. I desig-
[fol. 38] nated him. I made arrangements with him to so act. And when he had agreed, I gave him a letter confirming the agreement and specifying the conditions of the custodianship.

Q. Did the Committee, or subcommittee, by resolution authorize the submission of the subpoenas?

A. No.

Q. Is it customary for them to do so?

A. No.

Mr. Robb: You mean these particular subpoenas?

Mr. Brener: These particular subpoenas.

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IN UNITED STATES DISTRICT COURT

MOTION FOR PRELIMINARY INJUNCTION—
Filed October 31, 1963

The plaintiffs, James A. Dombrowski and Southern Conference Educational Fund, Inc., by their attorney, Walter E. Dillon, Jr., moves the Court for an order granting a temporary restraining order and preliminary writ of injunction against the defendants, Senator James Eastland and J. G. Sourwine their agents and employees, pending this suit, and until further order of the Court, upon the grounds and in accordance with the prayers as set forth in the complaint filed herein.

Walter E. Dillon, Jr., Attorneys for Plaintiffs.

[fol. 39]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JAMES O. EASTLAND

James O. Eastland, United States Senator from Mississippi, first having been duly sworn, deposes and says:

1. I am United States Senator from Mississippi, and Chairman of the Committee on the Judiciary of the United

States Senate and of the Subcommittee on Internal Security of that Committee.

2. I have read the complaint filed in this cause wherein I am named as a defendant. In particular, I have read paragraph 22 thereof.

3. I do not now have in my personal possession nor have I ever had in my personal possession either in the District of Columbia, or in the State of Mississippi or anywhere else, any of the documents, records or articles referred to in the complaint.

4. All such documents, records and articles, excepting those which have been returned to the Joint Legislative Committee on Un-American Activities of the State of Louisiana from which they were subpoenaed by the Subcommittee on Internal Security are now in the custody, possession and control of the Internal Security Subcommittee of the Committee on the Judiciary of the United States Senate and are being evaluated pursuant to the resolution adopted by the Subcommittee, November 14, 1963, a copy of which resolution is attached hereto and made part hereof as Exhibit A.

5. The subpoenas of the Subcommittee on Internal Security served upon the aforesaid Louisiana State Legislative Committee were authorized by me as Chairman of the Senate Committee on the Judiciary and the Subcommittee on Internal Security in a telephone conversation I [fol. 40] had with Mr. J. G. Sourwine, Counsel to the Subcommittee, on October 5, 1963, when Mr. Sourwine was in Baton Rouge, Louisiana.

6. I had nothing whatever to do with the acquisition of the SCEF material by the Louisiana Committee, or with the preparation, issuance, or service of the arrest and search warrants whereunder the Louisiana authorities obtained the material of SCEF which was later subpoenaed

by the Senate Internal Security Subcommittee. I deny emphatically that I was party to any conspiracy to obtain and execute such warrants, or to subpoena the material.

James O. Eastland, United States Senator.

IN UNITED STATES DISTRICT COURT

EXHIBIT A, ANNEXED TO FOREGOING AFFIDAVIT

November 14, 1963

Upon the conclusions of the testimony of the second of two witnesses heard in executive session, the Subcommittee considered and discussed the handling of material subpoenaed from the Joint Legislative Committee on Un-American Activities of the State of Louisiana.

Present: Senators Eastland, Dodd, Hruska, Dirksen and Scott.

After discussion, and on motion of Senator Dirksen, it was ORDERED that the Chairman be authorized to appoint a Task Force consisting of Senators Eastland, Johnston, Dodd, Hruska and Scott to evaluate the subpoenaed material progressively with respect to its value to the Subcommittee's investigation and to make determination from time to time respecting particular papers, documents, or other material to be inserted verbatim in the record of the Subcommittee; that all of the material not clearly irrelevant to the Subcommittee's investigation of Communist activity [fol. 41] generally, of Communist front activity, of Communist infiltration of organizations and groups, and/or the source of funds for Communist or Communist front activities be ordered into the Committee's hearing record by reference subject to the later determination of the Task Force respecting particular items which should be entered into the record verbatim; and that all of the original records obtained under the subpoena be photostated for the permanent records of the Subcommittee and, when so photostated,

be returned promptly to the possession of the Joint Legislative Committee on Un-American Activities of the State of Louisiana.

JAMES O. EASTLAND
Chairman

I consent and agree to the foregoing procedure.

JOHN F. MCCLELLAN
OLIN D. JOHNSTON
ROMAN L. HRUSKA

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF J. G. SOURWINE

District of Columbia, ss.:

J. G. Sourwine, being first duly sworn on oath, deposes and says:

1. From December 21, 1950, to January 21, 1955, I was Associated Counsel; from January 22, 1955 to January 24, 1956, I was Chief Counsel; from January 25, 1956, to January 31, 1956, and from October 1, 1956, to January 31, 1958, I was Associate Counsel; and from February 1, 1958, to the present I have been Chief Counsel of the Subcommittee of the Committee on the Judiciary of the United [fol. 42] States Senate to Investigate the Administration of the Internal Security Act and other Internal Security Laws, under S. Res. 366, 81st Congress, and (since March 1963) S. Res. 62, 88th Congress. This committee is also known as the Senate Internal Security Subcommittee.

2. The authority and purposes of the Internal Security Subcommittee are stated as follows in S. Res. 62:

"to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950, as

amended; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effect of subversive activities in the United States, its territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence."

3. In 1954 the Internal Security Subcommittee investigated the Southern Conference Educational Fund, Inc., to determine what if any subversive influences were operating in or through that organization. Hearings were held in New Orleans, Louisiana, on March 18, 19, and 20, 1954. Among the witnesses who testified during these hearings was James A. Dombrowski, Executive Director of the Southern Conference Educational Fund, Inc.

4. The report of the Senate Internal Security Subcommittee on its investigation of the Southern Conference [fol. 43] Educational Fund, Inc., published in 1955, stated in part as follows:

"The Southern Conference for Human Welfare was conceived, financed, and set up by the Communist Party in 1938 as a mass organization to promote communism throughout the Southern States. Earl Browder, former general secretary of the Communist Party in the United States, in a public hearing, identified the Southern Conference for Human Welfare as one of the Communist Party's 'transmission belts.' Under date of March 29, 1944, the Southern Conference for Human Welfare was cited by the Special Committee on Un-American Activities as a Communist front and, on June 12, 1947, by the Congressional Committee on

Un-American Activities as a Communist-front organization 'which seeks to attract southern liberals on the basis of its seeming interest in the problems of the South,' although its 'professed interest in southern welfare is simply an expedient for larger aims serving the Soviet Union and its subservient Communist Party in the United States.'

"2. The Southern Conference Educational Fund, Inc., was initially an adjunct of the Southern Conference for Human Welfare. After the exposure of the Southern Conference for Human Welfare as a Communist front, it began to wither and was finally dissolved, but the Southern Conference Educational Fund, Inc., continued. The official paper, the Southern Patriot, which was published by the Southern Conference for Human Welfare, was taken over by the Southern Conference Educational Fund, Inc., which professes the same ostensible purpose.

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"Dr. James A. Dombrowski was identified as executive director of the Southern Conference Educational [fol. 44] Fund, Inc., who immediately prior to the assumption of his present office, had been administrator of the Southern Conference for Human Welfare. Dr. Dombrowski was identified by a witness as one who, to the witness' certain knowledge, had been a member of the Communist Party. He was also identified by another witness as one who had accepted Communist Party discipline. • • •"

5. On several occasions prior to July 1963, Jack N. Rogers, Esquire, Counsel to the Joint Legislative Committee on Un-American Activities, State of Louisiana, asked me in my official capacity for information reflected in our files bearing upon various matters under investigation by the Louisiana Committee. Where public source information was available, it was furnished in response to these requests.

6. In July 1963, Mr. Rogers informed me that his Committee was investigating the Southern Conference Educational Fund, Inc. (hereinafter called SCEF), whose headquarters were in New Orleans, and in whose management James A. Dombrowski was still active. Mr. Rogers said that he thought the Committee would eventually subpoena the records of that organization. Knowing from public records that the Internal Security Subcommittee of the United States Senate had itself investigated SCEF in 1954, Mr. Rogers volunteered that if his Committee procured information which might be of interest to the Senate Committee, he would let the Senate Committee know. Sometime later, in August or September, 1963, Mr. Rogers asked me whether, if the Louisiana Committee subpoenaed the records of the SCEF, it might be possible for me and Mr. Mandel, Research Director of the Senate Committee, to come down to Louisiana, and assist in the evaluation of such records. I discussed the matter with Senator Eastland [fol. 45] who stated that it would depend upon what was found in the records; that if they should appear to be within the scope of the investigative authority of the Senate Committee then Mr. Mandel and I might go to Louisiana to look at them. Senator Eastland emphasized, however, that the Senate Committee had no interest in any debates or activities in which SCEF might have engaged with respect to civil rights or racial matters; that the Committee was interested only in material relating to Communist or Communist-front activities, especially Communist infiltration of mass organizations and the financing of Communist fronts.

7. At about 11:45 p. m., on October 4, 1963, while I was at my home in a suburb of Washington, I received a telephone call from Mr. Rogers who stated that his Committee had obtained the records of SCEF and that these records included a great deal of material which he believed would be of interest to the Internal Security Subcommittee. He asked that Mr. Mandel and I come down as soon as possible to assist in evaluation of these records. Mr. Mandel and

I left Washington by air from Friendship Airport at 8:20 a. m., the next morning, October 5. We arrived at Baton Rouge shortly before 11 a. m., Baton Rouge time, on October 5.

8. Having been informed by Mr. Rogers and by Colonel Fred Alexander, Chief Investigator for the Louisiana Committee, of the nature of the documents and the content of certain particular documents which had been secured, I concluded that the records of SCEF in the possession of the Louisiana State Committee did in fact include a substantial quantity of material which would be of interest to the Internal Security Subcommittee of the United States Senate in pursuance of its investigative functions and within the limits of the directive which had been given to me by Senator Eastland. I thereupon reported my con- [fol. 46] clusion to Senator Eastland by telephone, and recommended that all the material obtained by the Louisiana Committee be subpoenaed from that Committee by the Senate Internal Security Subcommittee. Senator Eastland authorized this to be done and thereafter on the same day, October 5, 1963, I served subpoenas duces tecum upon Mr. Pfister, Chairman of the Louisiana Committee, Mr. Rogers and Colonel Alexander calling for the production of all this material. It should be noted that the date "this 4th day of October" on the subpoenas is a typographical error, as the subpoenas were not typed or served until after my arrival at Baton Rouge on October 5, 1963.

9. Immediately following the service of the subpoenas duces tecum on October 5, 1963, I took possession, on behalf of the Senate Internal Security Subcommittee, of all the SCEF material then in the hands of the Louisiana State Committee. I arranged with Colonel Thomas D. Burbank, Superintendent of the Louisiana State Police, for him to hold this material as custodian for the Senate Committee. Subsequently, two staff members of the Internal Security Subcommittee brought the material to the Committee's offices in Washington, D. C.

10. Evaluation by the Senate Committee of the material subpoenaed from the Louisiana Committee proceeded as speedily as possible. It soon became apparent that there was a substantial quantity of material which could not reasonably be expected to be of any value to the Senate Subcommittee in its investigations. This material was promptly prepared for shipment and returned to the Louisiana Committee, being shipped on November 8, 1963.

On November 14, 1963, the Internal Security Subcommittee formally considered the matter of evaluation and disposition of the material secured under subpoena from the Louisiana Committee, and approved a resolution ordering that all the material be placed in the Subcommittee's [fol. 47] record by reference, that it be photostated as speedily as possible, that upon completion of photostating the originals be returned to the Louisiana Committee, and that a task force of five Senators undertake the work of evaluating the material to determine which items should be placed in the record verbatim. A copy of this resolution is attached to the affidavit dated December 4, 1963, of Senator James O. Eastland filed herein.

Work under this resolution is proceeding, and it is anticipated that additional material will be shipped back to the Louisiana Committee each week until all of the material obtained under the subpoena has been returned.

11. The material in the possession of the Senate Internal Security Subcommittee relating to the Southern Conference Educational Fund, Inc., is being studied, evaluated, and used by that Subcommittee pursuant to its duty to make a complete and continuing study and investigation of the extent, nature, and effect of subversive activities in the United States and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement. The material is directly relevant to these matters. The material relates not only to the activities and personnel of the Southern Conference Educational Fund, Inc., but also to the connections between that organization and other

organizations which appear to be Communist, Communist dominated, or Communist-front organizations, such for example as the Fair Play for Cuba Committee.

12. I had nothing whatever to do with the acquisition of SCEF material by the Louisiana Committee, or with the preparation, issuance, or service of the arrest and search warrants whereby the Louisiana authorities obtained the material of SCEF which was later subpoenaed by the Senate Internal Security Subcommittee. I deny emphatically that I was party to any conspiracy to obtain and execute such warrants, or to subpoena the material.

J. G. Sourwine

[fol. 48]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2678—63

[Title omitted]

PRAECIPE TO WITHDRAW PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION—December 13, 1963

The Clerk of said Court will please withdraw the plaintiffs' preliminary motion for preliminary injunction without prejudice.

I hereby certify that on this 13th day of December, 1963, I mailed, postage prepaid a copy of this praecipe to Joseph M. Hannon, Assistant United States Attorney, U. S. District Court and to Roger Robb, Esq., Woodward Bldg., D. C. attorneys for defendants.

Walter E. Dillon, Jr., 1625 Eye Street, N. W., Washington 6, D. C., Attorney for Plaintiffs.

[fol. 49]

IN UNITED STATES DISTRICT COURT

EXCERPT FROM SOURWINE DEPOSITION—AS CORRECTED

Q. Was there any further investigation by the subcommittee after 1954 into the Southern Conference Educational Fund or Dr. Dombrowski?

Mr. Robb: You mean prior to the present investigation?

Mr. Brener: Yes.

The Witness: I think the answer to that would be yes, in the sense that the Committee maintains a continuing interest in any organization which is subversive or which it considers to be a front organization.

In the sense of an actively pursued investigation to seek particular facts, I think the answer to your question would be, no. In the sense of continuing to maintain a file and to accumulate information which became available, I think the answer would have to be, yes.

* * * * * * *

Q. I want to direct your attention to paragraph five of the affidavit you filed.

A. Yes, sir; I have that before me. It begins, "On several occasions."

Q. Do you recall the first time you spoke to Mr. Rogers concerning that matter that is mentioned in paragraph five? You stated merely as being prior to July. Can you be more specific?

A. Not much more specific. I do not think I heard from Mr. Rogers or knew about him before the Spring of 1962, and it may not have been until the Summer of 1962. I am just not clear. I think the first time that Mr. Rogers ever asked for any information it was a request for assistance in digging out available public source material on the so-called Black Muslims, and I am afraid I was a little disappointing to him, because we had very little help that we could give him on the situation.

[fol. 50] I am not absolutely sure that that was the first request, but I think that is right.

Q. Is it correct that the first contact that you had with Rogers with respect to the SCEF was in July of 1963?

A. I think that is right.

Q. Would you recall the date in July?

A. No, I do not recall the date in July. It was after the Fourth of July.

Q. You heard from him by telephone?

A. I do not think so. I think he was here.

Q. In other words, he spoke to you personally?

A. I think that is right.

Q. Can you tell us, as best you can recall, the substance of the conversation?

A. Well, I think the substance of it is set forth in the affidavit. I will put it in different words, if you wish.

Q. That is quite all right. Did he mention, at that time, the possibility of police raids on the headquarters of the Southern Conference Educational Fund?

A. No, he did not.

Q. He mentioned only subpoena; is that correct?

A. I don't think he mentioned even subpoena at that time. I did, however, have an understanding that he was eventually, probably, going to subpoena the records of the SCEF.

Q. Reading from paragraph 6 of your affidavit where you state "Mr. Rogers said that he thought the Committee would eventually subpoena the records of that organization—

A: Yes, I see this.

Q. Does that refresh your memory as to the conversation concerning subpoena?

A. Yes.

Q. Did he state whether he intended to subpoena the list of contributors, a member's list?

A. No, there was no discussion about the particular records which would be subpoenaed.

[fol. 51] Q. Was there any mention of the fact that in the 1954 hearings Dr. Dombrowski had refused to produce a list of contributors?

A. No, there was not.

Q. There was none?

A. No.

Q. What did you reply to Mr. Rogers when he told you of his plans?

Mr. Robb: What did he what?

Mr. Brener: Reply to Mr. Rogers when he told you of his plans.

Mr. Hannon: Plans. I object to the use of the word plans. I understood Mr. Sourwine to say Mr. Rogers said he thought.

Mr. Brener: I will rephrase the question.

By Mr. Brener:

Q. His proposed plans, his possible plans?

A. I do not believe I made any specific reply to that. There was no reply called for. He was just giving me a piece of information.

Q. Did you convey this information to Senator Eastland?

A. I have no independent recollection of having done so. I may have.

Q. But you do not recall; is that right?

A. No, I do not. I did not, at the time, consider it of particular importance.

Q. You stated that "some time later in August or September of 1963 Mr. Rogers asked me whether if the Louisiana Committee subpoenaed the records of SCEF, it might be possible for me and Mr. Mandel to come down and assist the evaluation."

A. Yes.

Q. How did that conversation come about? Was it by long distance telephone?

A. No, I think that was in person.

Q. Do you recall whether it was August or September?

A. No. I have not been able to place that, sir, precisely. I think it was late August or early September.

[fol. 52] Q. Did Mr. Rogers suggest why he would require your assistance in evaluating this material?

A. Well, require is a pretty strong word. Mr. Rogers did indicate that he felt that Mr. Mandel, particularly, had a background which would enable him to be very helpful in evaluating any information they were able to get.

I think that would be true with regard to any Communist front activity or any subversive activity. Mr. Mandel is a very knowledgeable man in this field. I do not pretend to be as knowledgeable or nearly as knowledgeable as Mr. Mandel is myself, but Mr. Rogers was good enough to include me in the invitation.

Q. Did he discuss, at that time, how he proposed to get the material?

A. No, I do not believe it was specifically discussed. But, certainly, any discussion of it was in the connotation of subpoenaing the material. As a matter of fact, I did not know until after the material had been secured that it had not been secured through subpoena.

It was my understanding that Mr. Rogers had intended to subpoena the material and he changed his line of approach on that practically at the last minute and did it the other way.

Q. Was there any discussion, at that time, of contributor lists?

A. You mean, at the time when Mandel and I—it was suggested we should come to Louisiana, if we could?

Q. Yes.

A. No, there was not.

* * * * * * *

Now you state that about 11:45 p.m. on October 4—

Mr. Robb: Where are we now?

Mr. Brener: Paragraph 7.

[fol. 53] By Mr. Brener:

Q. —that you received a call from Mr. Rogers concerning the fact that his Committee had obtained the records of the Southern Conference Fund. Had you heard from Mr. Rogers at all since his visit to you in August or September?

That is, between that time and the time of this telephone call on October 4th?

A. I am sure I had. I think I may have had one or two letters from him, and I may have had one or two phone calls from him.

Q. Do you recall the nature of the conversations in the course of the telephone calls or the substance of the letters?

A. I can tell you they did not concern the SCEF, if that is what you are trying to get at.

Q. I am trying to find out. In other words, between the August and September visits to you in Washington and the call of October 4, there was no communication between you and Mr. Rogers concerning SCEF; is that correct?

A. To the best of my recollection that is correct; yes, sir.

Q. Where did this call on October 4 reach you? Where were you at the time?

A. At my home in Silver Springs.

Q. Did Rogers tell you where he was calling from?

A. No, he did not. I assumed he was calling from Baton Rouge. That is where he lives.

Q. What did he tell you precisely?

A. The information he conveyed to me was that the Louisiana State Committee had possession of the records and files, all of the records and files, he said, of the Southern Conference Educational Fund, and that he thought that there was a great deal of material in there that would be of interest to us.

* * * * * * *

Q. Was there any particular urgency that caused you to leave within 6 or 7 hours of the telephone call?

A. No, there was no urgency beyond the fact that Jack [fol. 54] was excited about what he considered important evidence and was what I thought naturally anxious to proceed with the evaluation of it.

It was a weekend. It was a good time to go. I had in mind we could go down and if we could settle the question, I could be back the following Monday. I had to be back the following Monday in Washington.

* * * * * * *

Q. Would you please look at this letter of October 5th?

A. Yes, sir; I have looked at it.

Q. In this letter—

A. This is my letter of October 5th to Colonel Burbank.

* * * * * * *

Q. You note that that refers to subpoena of October 4. Is that another error?

A. I am not sure. The subpoenas did bear that date, but the date was in error.

Q. When was this letter typed?

A. October 5.

Q. At the same time when the subpoenas were typed?

A. Not at the same time but a short time subsequent.

Q. The same afternoon?

A. The same afternoon.

Q. By the same individual?

A. By the same girl, yes, sir.

Q. Did you note at the time you signed this that it referred to the subpoena of October 4?

A. I did not note it in the sense of catching the discrepancy; no, sir. I did read it. I did not, however, dictate it. I dictated it, "In discharging," and so forth. I said, "put in the date of the subpoena."

* * * * * * *

Q. You recall clearly that the instructions you gave to the stenographer were to type in today's date, is that correct, on the others, fill in the date of the subpoenas?

A. I do not believe I gave her any specific instructions with regard to the date to put in on either the letter or the subpoenas. I assumed they would be today's date. [fol. 55] When I was dictating the text of the letter, I dictated it about like this:

"Dear Colonel Burbank: By direction of the Chairman and on behalf of the Internal Security Subcommittee"—I note now for the first time that the word "Security" is left out of this letter. I never noticed that before. I am sure I dictated, "Internal Security Subcommittee of the U. S. Senate, I have requested, and you have agreed, that you act for the Committee as temporary custodian of all those certain letters, documents, memoranda and other papers turned over to the Internal Security Subcommittee on this date by the Joint Legislative Committee on Un-American Activities, pursuant to the Committee's subpoena of"—and then I said, "Go ahead and identify the subpoena and the persons." Then I went on to say, "It is understood," and so forth.

Q. Now, subsequently, did you know of a hearing that was to take place in New Orleans in the Criminal District Court at the end of October, October 25, involving the validity of the warrant issued for the arrest of Dombrowski, Ben Smith, a resident of New Orleans, and Bruce Waltzer, a resident of New Orleans, arising out of these raids?

Mr. Hannon: Objection to whether they were raids. Is it one hearing you refer to, Mr. Brener, for all these people?

Mr. Brener: That is correct.

The Witness: I think I read about that hearing before it took place. I know I was informed about it after it took place.

By Mr. Brener:

Q. When were you informed about it, after it took place?

[fol. 56] Mr. Robb: Can you give us the date of the hearing?

Mr. Brener: October 25, 1963.

The Witness: I cannot remember, Mr. Robb, with regard to a particular date, but I am trying to remember it with regard to when it took place. I think I learned of it the day after the hearing.

By Mr. Brener:

Q. And how did you learn of it?

A. I am not sure whether I learned of it first through a telephone call from Mr. Rogers or through an inquiry from a newspaperman. I had several of the latter on that day, that is, the day following the hearing.

Q. Did you, in fact, receive a telephone call from Mr. Rogers within a day or two after the hearing?

A. I did.

Q. And what was the substance of that call?

A. Mr. Rogers told me that the judge in New Orleans had turned these people loose. That is the substance of the call.

Q. Where were you when you received the call?

A. I received it at my office.

Q. At your office?

A. Yes, sir; in the Senate Office Building.

Q. Did you, subsequently, within a day or two, learn of a suit filed in the Federal District Court in New Orleans, seeking return of the various documents that had been seized by the local police and damages?

A. Yes, I subsequently did learn of such an action. And, of course, it was an action filed here which leads to this.

Q. But prior to this action, you had learned of the action filed in New Orleans; is that correct?

A. Now, I am not sure about that. I am not sure that I heard about the New Orleans action before I heard about this action. I may have.

Mr. Robb: Do you have the date when that was filed?

[fol. 57] Mr. Brener: It would have been filed on Sunday, actually, which would have been the 27th.

The Witness: I think I first learned of the action in Louisiana by reading it in the newspaper. And I am not sure whether I read that clipping before or after I learned of the action filed here which included me as a defendant.

Mr. Robb: You say that was filed on a Sunday?

Mr. Brener: Yes.

Mr. Robb: Do they file cases on Sunday down there?

Mr. Brener: That is what the rules say.

The Witness: I do not know. You say it was filed on the 29th, unless I misunderstood you. I do not think the 29th would have been a Sunday.

Mr. Brener: No, the 27th. If I said the 29th, I was in error. I said the 27th, I believe.

The Witness: I am sorry. I may have misunderstood you.

Mr. Robb: I have a photo copy of Civil Action No. 1397.

Mr. Brener: That is the one.

Mr. Robb: And the date of the summons is October 29, 1963.

Mr. Brener: It may be the date on the summons. I will simply make a statement on the record that according to the rules of our courts a document is filed when it is presented to the court.

Mr. Robb: What?

Mr. Brener: We submitted it to Judge Ainsworth.

Mr. Robb: I would like to get straight on this. That is all. That is the same suit you are talking about?

[fol. 58] Mr. Brener: The same number you just read, Mr. Robb.

By Mr. Brener:

Q. Did you learn on that Sunday, October 27, of a suit filed in the Federal District Court in New Orleans?

A. On that Sunday?

Q. On Sunday.

A. No, I do not think so.

Q. Were you made aware of a telegram sent to Senator Eastland, advising of a hearing on a request for a temporary restraining order to be held Monday, the 28th?

A. Yes, I heard from Senator Eastland about a telegram, but it did not advise of any suit filed.

Q. What did it advise?

A. It did not advise of any action pending.

Q. What did it advise?

A. Now, I have never seen that telegram, because Senator Eastland read it to me over the telephone, but as near as I can remember that telegram said about this: Federal Judge Ainsworth—it may have given his first name—is expecting you in his chambers at a named time, the 28th, to discuss a preliminary injunction, or words to that effect, signed by a Mr. Bender.

Mr. Brener: Brener.

The Witness: Brener.

Mr. Brener: I will state, for the record, I did not send that telegram to Senator Eastland. I did not direct it to go to Senator Eastland.

By Mr. Brener:

Q. Did he send a telegram requesting a restraining order?

A. No, the telegram did not say anything about a request for one. It was cryptic in that regard. It simply said, to my best recollection, what I have outlined, that [fol. 59] Ainsworth was expecting him, Judge Ainsworth expected him in his chambers to discuss a preliminary injunction matter.

It did not say whether it was pending, to be filed against whom, or advising what.

Mr. Robb: Do you have a copy of that?

Mr. Brener: I want to read it into the record and then I will let you see it.

The Witness: Am I pretty close?

By Mr. Brener:

Q. Does this wording sound familiar to you? "Federal Judge Robert Ainsworth has requested your presence in his office 9:30 a.m., October 28, to discuss an injunction enjoining turning over SCEF and Smith and Waltzer records to Senator Eastland."

Mr. Brener: Let the record show I am exhibiting a copy of what I have just read to the witness.

The Witness: This appears to be a copy of a telegram actually sent. It does not bear a Western Union stamp and I do not remember this phrase "enjoining turning over SCEF and Smith and Waltzer records to Senator Eastland."

This may have been read to me by Senator Eastland. He may have stopped reading when he got to the word "injunction." I do not know.

By Mr. Brener:

Q. What makes you think he stopped there?

A. Simply because I do not remember the rest of it. He may very well have read it and it may have passed my memory. In further response to your prior question, I still [fol. 60] do not see anything there that there is an injunction or that an action has been instituted.

Mr. Robb: Could we have that marked, please?

The Witness: Is that dated the 29th, too?

Mr. Brener: The 27th. I am marking this Plaintiffs' Exhibit 3 for identification.

(Plaintiffs' Exhibit No. 3 was marked for identification.)

By Mr. Brener:

Q. What was the nature of Senator Eastland's call to you when he read the text of a telegram?

A. Senator Eastland called me and said, "I have this telegram." I might say, sir, I am testifying now concern-

ing matters which normally would be within the attorney-client privilege, but in anticipation of questions about this, I asked Senator Eastland about it and he said he had no objection to my recounting it, and so I will do so. And then he read me a telegram, I guess he read it or closely paraphrased it.

He said, "I do not see how this thing is in any way binding on me." And I said, "Clearly, it is not. If this was a summons, it would be signed by the judge or an officer of the court."

And the Senator then instructed me to have the records which were in our possession in the custodianship of Colonel Burbank moved, started on their way, to Washington. We had some little discussion about the problem involved in getting transportation to get them up here.

We would have to hire a truck and it would be difficult to do it on this day. And the Senator said, "Well, get them started." He said, "Get them over to Woodville and, if necessary, you can leave them with the Chancery Clerk [fol. 61] there, and then have the Committee boys pick them up and take them on from there."

So that is the way we handled it. I dictated a wire, over the telephone, to Colonel Burbank, instructing him to have the records transported, or to transport them, or cause them to be transported, I forget the exact words, to Woodville, and that his responsibility would end when he turned them over to the Chancery Clerk at Woodville.

Q. Mr. Sourwine, I want to show you a document I have marked Exhibit—

A. I have not finished. May I finish?

Q. I am sorry.

A. I had previously tried to reach Colonel Burbank by telephone, unsuccessfully, and then I dictated this wire and I thereafter called Mr. Rogers and told him what I had instructed Colonel Burbank to do, and asked him if he could get in touch with Colonel Burbank and to let me have some word back from him or Burbank that the instructions would be complied with.

Now that is the sum total of what I did about it. Now, what is this? This appears to be a copy of the wire I dictated over the telephone. "By direction Chairman you are instructed—this says eructed—transport material you hold as custodian for subcommittee to Woodville, Mississippi, and there transfer custody to Chancery Clerk, at which moment your custody and responsibility will end. Chairman instructs thanks your fine cooperation."

And my name and title.

Mr. Brener: This is Plaintiffs' 4 for identification.

(Plaintiffs' Exhibit No. 4 was marked for identification.)

By Mr. Brener:

Q. Did Senator Eastland give you any idea as to why he changed his original instructions which called for pro-
[fol. 62] duction of the documents on the 29th?

A. That was not changed until afterward. After the subpoenas had been served and they had voluntarily turned all the material over to us, it became unnecessary, thereafter, to have a subpoena duces tecum enforced for the production of those documents in Washington on a particular day. And, thereafter, when it became inconvenient to hold a hearing on that day, the documents turned out to be as voluminous as we had expected, the evaluation is still proceeding within the Committee, the hearing on the 29th was cancelled and the parties were notified as to that.

Q. Why was the telegram sent at 11:43 at night, if that is a fact?

A. The telegram was sent with reasonable speed in doing the things I have told you, in the order I told you about them, I think. This is what happened. I got the call from Senator Eastland.

It was in the evening. It was fairly late in the evening. I tried to reach the Colonel by phone and could not do it. I dictated the telegram and then I called Rogers and that stopped it.

Now as to why I acted with this dispatch, it is my custom to act with all possible dispatch whenever I get a positive instruction from the Chairman. I have come to learn that is what he wants and that is what he gets.

Q. Was it your understanding that there was any connection between the request for injunction and the sudden removal of the documents from the State of Louisiana?

A. I did not know about a request for an injunction, sir, but certainly I had in my mind—and I imagine Senator Eastland had in his mind—the fact that if there was to be litigation about the documents, nobody should be dragged into it and involved in it except the Committee and the Committee personnel, and that the documents should be taken out of the possession of a custodian who held an official position with the State and might, because he wore [fol. 63] two hats, one as head of the State Police and one as custodian for us, become involved in an awkward situation.

Now I did not discuss this with Senator Eastland, but I admit that I did have that possibility in mind.

Q. Was it your understanding that the other members of the Internal Security Subcommittee knew of this proposed act for the sudden transfer of the documents?

A. No, it was not my understanding. It was not discussed with Senator Eastland at all. I doubt whether there was any communication between him and them. There may have been.

Q. Has this sequence of events that you have described been brought to the attention of the other members of the subcommittee?

A. I think it has been brought to the attention of all of the members of the subcommittee; yes, sir.

Q. Is it correct that the purpose of the removal of the documents was to put them beyond the jurisdiction of the Federal Judge in New Orleans?

A. This is correct. The Federal Judge would have had no jurisdiction under any circumstances. They were in the

possession of the United States and no Federal court would have had any jurisdiction over them at all.

Q. So this removal was not for that purpose?

A. No, not to my knowledge.

Q. Do you know when the documents were actually moved to Woodville?

A. No, I do not know. I have always assumed they started on their way within a few hours after I sent the telegram.

Q. At one o'clock in the morning?

A. Well, I do not know the particular time, but I received a telephone call from Mr. Rogers the following morning, or maybe it was from Mr. Alexander, I am not sure, one or the other, telling me that the documents were on their way and that fairly early in the morning.

I just assumed that they were moved right up.

[fol. 64] Q. We are talking about approximately 80 large cartons of documents, are we not?

A. We are talking about a truck load of documents; yes, sir.

Q. And you indicate that it would be normal for you to give such instructions at 11:40 at night for the removal of that quantity of documents?

A. Sir, my testimony is on the record. If you want to challenge it, you bring somebody that has some basis for challenging it. Do not sit here and impugn what I have told you as untrue.

Q. Is it normal precedure for you to give such instructions at 11:40 at night, even in the absence of any proposed litigation possibly affecting the documents?

A. That is a loaded question. I have told you that it is my policy and practice to implement Senator Eastland's instructions as speedily as I can. I do not think I have ever had an instruction from him in all the time I have served under him as Chairman that was not implemented as speedily as I could after he gave them to me.

And I have had instructions some times later than 11 o'clock at night. I have never gone to bed on an instruction

from the Chairman without doing everything I could to implement it before going to bed.

Q. Now you have been either Counsel or Assistant Counsel to this Committee since 1950 except for an 11-month period?

A. That is correct.

Q. I want to ask you whether or not his instructions to remove this to the Chancery Clerk of Mississippi impressed you as being odd or unusual or out of the ordinary insofar as routine procedures are concerned?

A. Well, you have several points there. Certainly it was out of the ordinary. It did not impress me as odd and my handling of the instructions was routine with me. I did it as speedily as I could, after I got the instructions.

• • • • • • •

[fol. 65] Q. One more question about the subpoenas that were issued on the 5th. Do you recall if you instructed the young lady who filled in the subpoenas to type in today's date, that is, the date on which they were typed, or whether they were to be back-dated?

A. I do not recall giving her any instructions at all about the date.

Q. You gave her no instructions at all?

A. I do not recall having given her any. I think if I did give her any, I said "today's date." I do not believe I gave her any instructions about the date. This girl is an experienced legal stenographer. You do not spell out everything.

Q. You told her the return date; is that correct?

A. I did.

Q. And you gave her the description of the documents that were being subpoenaed?

A. No, I did not say that. I said, "Take the description from the subpoenas," and I gave her a copy of the subpoenas that had been used in obtaining them for the police.

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Recross Examination,

By Mr. Hannon:

Q. Mr. Sourwine, let me ask one question, if I may. From the date October 5, including October 5, up to the present time, what has your position been?

A. Chief Counsel, Internal Security Subcommittee, United States Senate.

Q. And with respect to these questions Mr. Brener has been asking you this afternoon, were you at all times functioning in your official capacity as Chief Counsel of the Internal Security Subcommittee?

A. I was.

• • • • • • •

[fol. 66]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JAMES H. PFISTER (FILED AS EXHIBIT 1 TO DEFENDANTS' MOTION)

State of Louisiana,
Parish of Orleans, ss.:

Before me, the undersigned authority, duly qualified and commissioned in and for the Parish and State above written, personally came and appeared:

James H. Pfister who, having been duly sworn, did depose and say:

My name is James H. Pfister and I reside at 335 18th Street, New Orleans, Louisiana.

On December 5, 1959, I was elected to the House of Representatives of the Legislature of the State of Louisiana, and on the second Monday in May 1960, I was sworn into office and I am still serving in this capacity.

Representatives Tessier, A. D. Brown and I introduced and sponsored House Concurrent Resolution No. 13, at the Regular Session of the 1960 Legislature, the purpose of which Resolution was to establish the Joint Legislative Committee on Un-American Activities for Louisiana. This

Resolution was unanimously adopted by the House and the Senate and approved by Governor Jimmie H. Davis in July 1960. A copy of this Resolution is attached to this affidavit as Exhibit A.

Shortly after the Resolution was approved, and pursuant to the requirements of the Resolution, five Senators were appointed to the Joint Legislative Committee on Un-American Activities by the President of the Senate and in like fashion five members of the House of Representatives were appointed to the Committee by the Speaker of the House. I was elected Chairman of the Committee at the first meeting of the Committee and have served as Chairman ever since. Hereinafter, the Joint Legislative Committee on Un-American Activities for the State of Louisiana shall be referred to as the Joint Committee.

[fol. 67] Sometime during 1962 the Joint Committee became interested in the activities of the Southern Conference Educational Fund, Inc., the offices of which were located at 822 Perdido Street, New Orleans, Louisiana. This interest was stimulated in part by the knowledge of the Joint Committee of a report published in 1955 by the Internal Security Subcommittee of the United States Senate in which the Southern Conference Educational Fund, Inc. was found to be a communist front.

The Joint Committee instructed its Staff Director, Colonel Frederick B. Alexander, and its Committee Counsel, Jack N. Rogers, to have the Joint Committee staff conduct an investigation of the Southern Conference Educational Fund, Inc. (hereinafter called SCEF). Such an investigation was undertaken and as part thereof Mr. Rogers was authorized by the Joint Committee to go to Washington, D. C., to consult with the Internal Security Subcommittee of the United States Senate.

Sometime during September of 1963 at a meeting of the Joint Committee, Colonel Alexander and Mr. Rogers informed the Joint Committee of the facts relating to SCEF uncovered by the staff investigation up to that point. Mr. Rogers expressed the opinion that the operations of SCEF

were in violation of Louisiana criminal statutes relating to subversive activities. The Joint Committee concurred in this opinion and instructed Mr. Rogers and the Staff Director to take the matter up with the Louisiana State police authorities.

On the night of October 4, 1963, pursuant to a telephone call I received from Mr. Rogers, I went to the New Orleans Police Academy, New Orleans, Louisiana, where I met Mr. Rogers. Mr. Rogers informed me at this time that the police authorities had seized the books, records and documents of SCEF and he described the nature of some of the documents to me. I thereupon authorized Mr. Rogers to serve a subpoena upon the appropriate authority to require [fol. 68] the production before the Joint Committee of all books, records and documents seized from SCEF.

On the following day, October 5, 1963, Mr. J. G. Sourwine of the Internal Security Subcommittee of the United States Senate served United States Senate subpoenas on Mr. Rogers, Colonel Alexander and me requiring the production of the same books, records and documents of SCEF before his subcommittee. Access to the books, records and documents was allowed us between October 5 and October 27, 1963, pending their transportation to Washington, D. C., pursuant to Mr. Sourwine's subpoenas.

The Joint Committee held a hearing involving SCEF on November 8, 1963, at which time copies of many of the documents seized from SCEF were introduced into evidence. Upon the basis of the evidence produced, the Joint Committee resolved as a legislative finding that SCEF was a communist front and a subversive organization, aiding and abetting the communist conspiracy.

I do not know Senator James O. Eastland nor have I ever met him. I have never communicated with him or contacted him in any way either directly or indirectly. Nor have I ever had anything to do with Mr. J. G. Sourwine except on October 5, 1963, when he served a subpoena upon me. This was my first and only meeting with Mr. Sourwine and the only time I ever spoke to him. Finally, I

wine ever had anything to do with determinations made by wine ever had anything to do with de terminations made by me or by the Joint Committee regarding what action should be taken concerning SCEF, its personnel, and its records.

James H. Pfister

Subscribed and sworn to before me, a notary public, at New Orleans, Louisiana, this 4th day of January, 1964.

.....

Notary Public.

[fol. 69]

EXHIBIT A, ANNEXED TO FOREGOING AFFIDAVIT

By: MESSRS. PFISTER
TESSIER and
A. D. BROWN

HOUSE CONCURRENT RESOLUTION No. 13
Regular Session, 1960
A Concurrent Resolution

WHEREAS, this state and this country face grave public danger from enemies both within and without our boundaries, and

WHEREAS, these subversive groups and persons under the color of protection afforded by the Bill of Rights of the United States Constitution seek to destroy us and the ideals for which we fought to preserve and subject us to the domination of foreign powers and ideologies, and

WHEREAS, Louisiana, as one of the laboratories of this great country, may study profitably this problem within its boundaries and enact remedial legislation if facts therefor are made available, and

WHEREAS, necessary and desirable legislation to meet this grave problem and to assist local enforcement officers to be effective must be based on a thorough and impartial

investigation by a competent and active legislative committee.

THEREFORE, BE IT RESOLVED by the House of Representatives of the Legislature of the State of Louisiana, the Senate concurring therein, that there is hereby created the Joint Legislative Committee on Un-American Activities which Committee shall consist of ten members, five to be appointed by the Speaker of the House of Representatives [fol. 70] from the membership of the House and five to be appointed by the President of the Senate from the membership of the Senate which committee shall study, investigate and analyze all facts relating directly or indirectly to the subject expressed in the recitals of this resolution; to the activities of groups and organizations which have as their objectives, or as part of their objectives, the overthrow of the State of Louisiana, or of the United States by force, violence or other unlawful means; to all organizations known to be or suspected of being dominated or controlled by a power seeking to impose a foreign political theory upon the government and people of the United States; to all persons who belong to or are affiliated with such groups or organizations; and to the manner and extent in which such activities affect the safety, welfare and security of this state in National Defense, the functioning of any state agency, unemployment relief and other forms of public assistance, educational institutions in this state including but not limited to the operation, effect, administration, enforcement and needed revision of any and all laws in any way bearing upon or relating to the subject of this resolution.

BE IT FURTHER RESOLVED that the Committee shall have the authority to:

(a) Select a chairman and a vice chairman from its membership; and to employ and fix the compensation of a secretary and such clerical, investigative, expert and technical assistants as it may deem necessary.

(b) Contact and deal with such other agencies, public or private, as it may deem necessary for the rendition and affording of such services, facilities, studies and reports as will best enable the committee to carry out the purposes for which it is created.

[fol. 71] (c) Cooperate with and secure the cooperation of parish, city, city and parish, and other local law enforcement agencies in investigating any matter within the scope of this resolution,

(d) Cooperate with and meet with similar committees of other states and of the Federal Government, or representative thereof, outside of this state, and expenses necessarily incurred in connection therewith by any of the members or staff of the committee, thereunto duly authorized by the chairman, shall constitute a proper charge against the sums allocated to the committee,

(e) Do any and all other things necessary or convenient to enable it fully and adequately to exercise its powers, perform its duties, and accomplish

(f) Adopt and from time to time amend such rules the objects and purposes of this resolution, and governing its procedure as may appear appropriate.

Be It Further Resolved that every department, commission, board, agency, officer and employee of the State Government of Louisiana and of any political subdivision, parish, city or public district of or in this state, shall furnish the committee and any subcommittee, upon request, any such information, records and documents as the Committee or subcommittee deems proper for the accomplishment of the purposes for which the committee is created; provided, however, that this provision shall not extend to, nor shall it be construed to make available to the committee or any subcommittee thereof, any record or other document excluded from the application of the Public Records Act,

as found in Part I of Chapter I of Title 44 of the Louisiana Revised Statutes of 1950, or any other record or document which under the law is made a confidential record.

[fol. 72] BE IT FURTHER RESOLVED that the committee shall have the power and authority to hold hearings at any place in Louisiana, which meetings may be public or private, to subpoena witnesses, administer oaths, require the production of books and records pertinent to any inquiry before the Committee and to do all other things necessary to accomplish the purposes of this resolution.

BE IT FURTHER RESOLVED that the Committees shall have authority to apply to any court of competent jurisdiction for enforcement of any order issued by it for the production of books, records or other documents or to compel the attendance of any witnesses subpoenaed to appear before it and, upon request of the commission, the Attorney General shall prosecute any witness who is guilty of refusal to testify or who gives false testimony, and persons guilty of false swearing or of giving false testimony shall be punished in accordance with the criminal laws of this state relating to false swearing or perjury, as the case may be, and

BE IT FURTHER RESOLVED that the committee shall submit its findings and recommendations to the Legislature at each of its regular sessions and at such other times as the committee may deem necessary and desirable.

BE IT FURTHER RESOLVED that the members of the committee created herein shall serve without compensation but shall receive the same per diem and travel allowance in the performance of their duties as is provided for members of the Legislature.

BE IT FURTHER RESOLVED that the per diem and travel allowance herein authorized and all other expenses incurred by the committee shall be paid out of funds available to the presiding officers of the two houses of the Louisiana Legis-

lature for expenses of the Legislature and Interim Committees; provided, however, that the disbursements for all expenses incurred by the committee, including the payment [fol. 73] of per diem and travel allowances for members as herein authorized shall be approved by the chairman of the committee.

.....

Speaker of The House of Representatives

.....

Lieutenant Governor and President of The Senate

Approved: .....

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF JACK N. ROGERS (FILED AS EXHIBIT 2 TO DEFENDANTS' MOTION)

State of Louisiana,
Parish of East Baton Rouge, ss.:

Before Me, the undersigned authority personally came and appeared: Jack N. Rogers, who, after first being duly sworn, did depose and say:

I am a member of the bar of the State of Louisiana and of the Supreme Court of the United States. I am engaged in the general practice of law in Baton Rouge, Louisiana. My home address is 1213 Knollwood Drive, Baton Rouge, Louisiana, and my office address is 840 Commerce Building, Baton Rouge, Louisiana. Since March, 1961, I have been counsel for the Joint Legislative Committee On Un-American Activities of the Legislature of the State of Louisiana, hereinafter referred to as the Joint Committee.

The Joint Committee was created by House Concurrent Resolution No. 13, Regular Session, 1960, of the Louisiana

Legislature, hereinafter referred to as Resolution No. 13. That resolution provided in part:

"WHEREAS, this state and this country face grave public danger from enemies both within and without our boundaries, and

[fol. 74] WHEREAS, these subversive groups and persons under the color of protection afforded by the Bill of Rights of the United States Constitution seek to destroy us and the ideals for which we fought to preserve and subject us to the domination of foreign powers and ideologies, and

WHEREAS, Louisiana, as one of the laboratories of this great country, may study profitably this problem within its boundaries and enact remedial legislation if facts therefor are made available, and

WHEREAS, necessary and desirable legislation to meet this grave problem and to assist local enforcement officers to be effective must be based on a thorough and impartial investigation by a competent and active legislative committee.

THEREFORE, BE IT RESOLVED by the House of Representatives of the Legislature of the State of Louisiana, the Senate concurring therein, that there is hereby created the Joint Legislative Committee on Un-American Activities which Committee shall consist of ten members, five to be appointed by the Speaker of the House of Representatives from the membership of the House and five to be appointed by the President of the Senate from the membership of the Senate which committee shall study, investigate and analyze all facts relating directly or indirectly to the subject expressed in the recitals of this resolution; to the activities of groups and organizations which have as their objectives, or as part of their objective, the overthrow of the State of Louisiana, or

of the United States by force, violence or other unlawful means; to all organizations known to be or suspected of being dominated or controlled by a power seeking to impose a foreign political theory upon [fol. 75] the government and people of the United States; to all persons who belong to or are affiliated with such groups or organizations; and to the manner and extent in which such activities affect the safety, welfare and security of this state in National Defense, the functioning of any state agency, unemployment relief and other forms of public assistance, educational institutions in this state including but not limited to the operation, effect, administration, enforcement and needed revision of any and all laws in any way bearing upon or relating to the subject of this resolution.

Be It Further Resolved that the Committee shall have the authority to:

(a) Select a chairman and a vice chairman from its membership; and to employ and fix the compensation of a secretary and such clerical, investigative, expert and technical assistants as it may deem necessary.

(b) Contact and deal with such other agencies, public or private, as it may deem necessary for the rendition and affording of such services, facilities, studies and reports as will best enable the committee to carry out the purposes for which it is created.

(c) Cooperate with and secure the cooperation of parish, city, city and parish, and other local law enforcement agencies in investigating any matter within the scope of this resolution.

(d) Cooperate with and meet with similar committees of other states and of the Federal Government, or representative thereof, outside of this state,

and expenses necessarily incurred in connection therewith by any of the members or staff of the committee, thereunto duly authorized by the chairman, [fol. 76] shall constitute a proper charge against the sums allocated to the committee."

Since the creation of the Joint Committee, and in carrying out its functions and purposes under the foregoing Resolution No. 13, it has studied, investigated, and analyzed the facts relative to a number of known or suspected subversive organizations operating in the State of Louisiana. Among such organizations which have been scrutinized by the Joint Committee is Southern Conference Educational Fund, Inc., hereinafter referred to as the SCEF. The offices of the SCEF were and are located at 822 Perdido Street, New Orleans, Louisiana. The Joint Committee's interest in the SCEF arose out of the fact that in 1954 the SCEF was found by the Internal Security Sub-Committee of the United States Senate after investigation, to be a communist front organization. The activities and purposes of SCEF have continued unchanged since 1954. Investigation by the Joint Committee prior to October 1963 disclosed that the direction and control of the SCEF and its publication, The Southern Patriot, were in the hands of persons who had at various times been identified by witnesses under oath as Communists. Among such persons were James A. Dombrowski, Executive Director of the SCEF; Aubrey Williams, President Emeritus; Carl Braden, Field Organizer and formerly Field Secretary of the SCEF and Editor of the Southern Patriot; Ann Braden, Editor, the Southern Patriot and formerly Field Secretary and Editor; and William Howard Melish, Eastern Representative (fund raiser) of the SCEF; Benjamin E. Smith, Treasurer of the SCEF, was also a national board member of The National Lawyers Guild, an identified communist front organization. Certain other officers or former officers of the SCEF had also been identified as communists.

In carrying out my duties as counsel to the Joint Committee pursuant to Resolution No. 13, I requested the In-
[fol. 77] ternal Security Sub-Committee of the United States Senate to furnish me with such information as that sub-committee could properly give with respect to the SCEF. I made this request on or about July 17, 1963, of Mr. J. G. Sourwine, counsel of the Senate Sub-Committee. Mr. Sourwine did furnish me certain relevant and helpful information from the public records of his committee. I suggested to Mr. Sourwine that at some future time our Joint Committee might subpoena the records of the SCEF, and that if we did so, and if any material relevant to the responsibilities of his committee should be obtained, I would promptly let him know.

Around the middle of September, 1963, according to my best recollection, as to the time, I telephoned to Mr. Sourwine and asked him whether, in the event that the Joint Committee subpoenaed the records of the SCEF, he and Ben Mandel, a member of his staff, could help us to evaluate the material. My request for this assistance was prompted by the fact that I knew Mr. Sourwine and Mr. Mandel were experts in the field of subversive organizations and activities.

Pursuant to the Joint Committee's authority under Resolution No. 13, the staff of the Joint Committee also examined the files of the Louisiana State Police and of other Louisiana police agencies relative to the SCEF.

Having considered and analyzed the material and information that had been collected respecting the SCEF and its activities, I concluded, and so advised the Joint Committee, that the operations of the SCEF were in violation of the Louisiana criminal statutes dealing with subversive activities. The Joint Committee concurred in this conclusion, and directed me to take the matter up with the Louisiana State Police. Accordingly, on or about September 20, 1963, I went to Colonel Thomas D. Burbank, Superintendent, Louisiana State Police, presented the facts of the

matter to him, and requested that he have the State Police [fol. 78] obtain and execute search warrants for the offices of the SCEF and the premises occupied by James A. Dombrowski and certain other officers of the SCEF. Colonel Burbank, thereupon designated Major Russell R. Willie as the officer to be in charge of the matter. I offered to assist the police in obtaining the warrants, and my offer was accepted.

On October 2, 1963, Major Willie and I appeared before the Honorable Thomas M. Brahney, Jr., Judge, Criminal District Court, Parish of Orleans. At this time Major Willie swore to applications for search warrants for the offices of the SCEF, and the residences of James A. Dombrowski, Benjamin E. Smith and Bruce C. Waltzer, Major Willie and I at the same time swore to applications for arrest warrants for Dombrowski and the other two. Being satisfied that probable cause existed, Judge Brahney signed and issued the warrants.

The warrants were executed by Louisiana State Police and New Orleans Police, all of whom were under the direction and supervision of Major Willie, on October 4, 1963, by the seizure of the materials described in the search warrants and the arrest of the persons named in the arrest warrants. Execution of the warrants was pursuant to the commands set forth therein.

Shortly after the execution of all of the warrants, and after a preliminary examination of the seized material by me, I served on Major Willie a subpoena duces tecum requiring the forthwith production of all of the seized material before the Joint Committee. At my direction Major Willie then transported the material to Baton Rouge, where it was held by the State Police as custodians for the Joint Committee.

At about 10:30 P. M. on October 4, 1963, after my return from New Orleans to Baton Rouge, I telephoned Mr. Sourwine at his home. I told him that it was plain to me that the SCEF material obtained by the Joint Committee would

[fol. 79] be of substantial interest to his sub-committee, and I urged that he and Mr. Mandel come to Baton Rouge to examine it as soon as possible. He indicated that they would try to be in Baton Rouge the next day, October 5, and they did arrive the next day.

After Mr. Sourwine and Mr. Mandel made some examination of the seized material, Mr. Sourwine prepared and served subpoenas upon me, the chairman, and the staff director of the Joint Committee, requiring the production of the material before the Internal Security Sub-Committee of the Judiciary Committee of the United States Senate. The subpoenas were typed on October 5, 1963, by Mrs. Laura Nicholson, an employee of the Joint Committee, at the Committee offices in the Old Capitol Building. At the same time Mr. Sourwine also had Mrs. Nicholson type several letters to Colonel Burbank, designating Colonel Burbank as custodian of the material for the Senate Internal Security Sub-Committee, and authorizing access to such material by representatives of the Louisiana Joint Committee.

Between October 5, 1963 and October 27, 1963, the staff of the Joint Committee examined, studied and copied a substantial amount of the seized material. We were assisted in this work for two days by Mr. Mandel. It may be said parenthetically that on November 8, 1963, the Joint Committee held a hearing in the SCEF matter, at which time copies of many of the seized documents were introduced in evidence. On the same day, and on the basis of the evidence produced, the Joint Committee resolved, as a legislative finding, that the Southern Conference Educational Fund, Inc., was a Communist front organization, and also a subversive organization, aiding and abetting the Communist conspiracy. A full report of this hearing was published by the Joint Committee on November 19, 1963.

[fol. 80] On October 27, 1963, at about 10 o'clock P. M., Baton Rouge time, Mr. Sourwine telephoned to me that he had been trying unsuccessfully to reach Colonel Burbank. He asked me to give Colonel Burbank Senator Eastland's

instructions to move all the SCEF material to Woodville, Mississippi immediately; he said that a telegram containing such instructions to Colonel Burbank would follow. I promptly conveyed Senator Eastland's instructions to Colonel Burbank, and the materials were sent to Woodville the next morning.

Senator Eastland and Mr. Sourwine had nothing whatever to do with the seizure of the SCEF material by the Louisiana Police or the acquisition of such material by the Joint Committee. Their only connection with the entire matter was as set forth in this affidavit. Finally, I wish to make it entirely clear that at no time did I inform either Senator Eastland or Mr. Sourwine of the decision to proceed against the SCEF and its officers by way of arrest and search warrants rather than by way of subpoena.

Jack N. Rogers

Sworn to and subscribed before, Notary, at Baton Rouge, Louisiana, this 25th day of January, 1964.

Steve A. Mitool Jr., Notary Public.

[fol. 81]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF THOMAS D. BURBANK (FILED AS EXHIBIT 3 TO DEFENDANTS' MOTION)

State of Louisiana,
Parish of East Baton Rouge, ss.:

Before me, the undersigned authority, duly qualified and commissioned in and for the Parish and State above written, personally came and appeared: Thomas D. Burbank, who, having been duly sworn, did depose and say:

That he is the duly appointed Director of Public Safety and Superintendent of State Police of the State of Louisiana, having been appointed by Honorable Jimmie H. Davis, Governor of Louisiana, on January 3, 1962, which appoint-

ment was confirmed by the Senate of the State of Louisiana. He has been an officer of the Louisiana State Police since 1941, when he was appointed a trooper. He graduated from the National Police Academy of the Federal Bureau of Investigation in 1954.

That prior to October 4, 1963, in his official capacity as head of the Department of Public Safety and the Division of State Police, affiant was informed by Jack N. Rogers, Chief Counsel for the Joint Legislative Committee on Un-American Activities of the Legislature of Louisiana, and Major Russell R. Willie, of activities being carried on by James A. Dombrowski and the Southern Conference Educational Fund, Inc., in New Orleans, Orleans Parish, Louisiana, as well as by Benjamin E. Smith and Bruce Waltzer, in violation of statutes of the State of Louisiana, particularly R. S. 14:358 et seq., and R. S. 14:390 et seq., which relate to communist and other subversive activities.

That on or about September 20, 1963, a request was made of affiant by Jack N. Rogers, on behalf of the Joint Legislative Committee on Un-American Activities and pursuant to House Concurrent Resolution No. 13, Regular Session, 1960, to have the Louisiana State Police conduct a search of the premises being used by the aforenamed individuals [fol. 82] and organization in violation of Louisiana's communist and subversive activities laws. Acting in his official capacity as Director of Public Safety and Superintendent of State Police, affiant designated Major Russell R. Willie as the State Police officer in charge of all police efforts to be undertaken by the department in this matter. Major Willie was and still is in charge of the Department's Bureau of Identification and Investigation.

The actions taken by affiant's subordinates on October 4, 1963, in arresting James A. Dombrowski and some of his associates and searching the premises of the Southern Conference Educational Fund, Inc., and James A. Dombrowski and his automobile were carried out pursuant to the directions contained in arrest and search warrants issued by Judge Thomas M. Brahney, Jr., on October 2, 1963.

That at no time did affiant enter into any plan or agreement under the color of State laws and statutes to deprive James A. Dombrowski or any other person of any rights, privileges and immunities granted to them as citizens of the United States of America by the laws and constitution of the United States, but rather he at all times conducted himself in his official capacity as a police officer whose duty it is to enforce the laws of the State of Louisiana and the United States of America and to uphold the constitutions of the State of Louisiana and the United States of America.

That affiant at no time authorized or instructed any of the State Police under his command to engage in any illegal activities. He at no time acted in an individual capacity in the matter of James A. Dombrowski and the Southern Conference Educational Fund, Inc., Benjamin E. Smith and Bruce Waltzer, but always acted in his official capacity as Director of Public Safety and Superintendent of State Police.

That affiant personally took no part in the searches and arrests made on October 4, 1963, in the City of New Orleans [fol. 83] involving the premises and persons of James A. Dombrowski, Benjamin E. Smith and Bruce Waltzer, and the premises of the Southern Conference Educational Fund, Inc.

That the documents seized on October 4, 1963, from the offices, residence and automobile of James A. Dombrowski and the Southern Conference Educational Fund, Inc., and Benjamin E. Smith and Bruce Waltzer, having been subpoenaed by the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature on October 4, 1963, were delivered to the headquarters of the Louisiana State Police by the Joint Legislative Committee on Un-American Activities for storage and safekeeping. That on October 5, 1963, the documents having been subpoenaed by the Internal Security Sub-Committee of the United States Senate, affiant was appointed temporary custodian of the documents by direction of the Chairman of the Internal Security Sub-Committee of the United States Senate.

That affiant, acting purely as custodian for said Sub-Committee of the United States Senate, did retain custody of all documents seized on October 4, 1963, until October 28, 1963, when by direction of Mr. J. G. Sourwine, representative of the Internal Security Sub-Commfttee of the United States Senate, he delivered them to Honorable J. Y. Chapman, Clerk of the Chancery Court, Wilkinson County, Woodville, Mississippi, and received his receipt therefor.

That affiant never had any communication, directly or indirectly, with Senator James O. Eastland or the Honorable J. G. Sourwine with respect to any action contemplated or proposed to be taken by the Louisiana State Police or the Louisiana Joint Legislative Committee in the matter of the Southern Conference Educational Fund, Inc., or James A. Dombrowski and his associates engaged in the operation, control and management of the Southern Conference Educational Fund, Inc. Nor has there ever [fol. 84] been any agreement or concert of action, direct or indirect, between affiant and Senator Eastland or Mr. Sourwine with respect to any proposed or contemplated action by the Louisiana authorities involving the Southern Conference Education Fund, Ind., Dombrowski and his associates either jointly or severally.

Thomas D. Burbank, Director of Public Safety, State of Louisiana.

Sworn to and subscribed before me at Baton Rouge, Louisiana, this 3rd day of January, 1964.

Jack N. Rogers, Notary Public.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF RUSSELL R. WILLIE (FILED AS EXHIBIT 4 TO DEFENDANTS' MOTION)

State of Louisiana,
Parish of East Baton Rouge, ss.:

Before Me, the undersigned authority, duly qualified and commissioned in and for the Parish and State above written, personally came and appeared Russell R. Willie, who, having been duly sworn, did depose and say:

That he is employed by the Department of Public Safety, Division of State Police, State of Louisiana, in the capacity of Major at the State Police Headquarters, Foster Drive, Baton Rouge, Louisiana. That affiant has been employed by the Department of Public Safety in various capacities as a State policeman for a period in excess of twenty-one years.

[fol. 85] That his primary duty as a Major of the Louisiana State Police is now and was in October 1963, to act as supervisor of the Bureau of Identification of that governmental agency; that among the various functions performed by said Bureau are the maintenance of fingerprint records forwarded to the Department by various law enforcement agencies throughout the State of Louisiana and the United States, the receipt and classification of all material dealing with known and suspected subversive organizations as well as individuals known to belong to or associate with said organizations. In addition, according to Louisiana state law all communists in the State of Louisiana and all individuals there who are knowingly members of a communist front organization as defined in the statute are required to register with the Department of Public Safety, and such registration is under the affiant's immediate supervision.

That in his official capacity as a State Police officer and in company with Jack N. Rogers, Esq., counsel for the Joint Legislative Committee on Un-American Activities of the

Louisiana Legislature, affiant on October 2, 1963, went to the Criminal District Court in New Orleans, Louisiana, and made application to Honorable Thomas M. Brahney, Jr., Judge of Section "D" Criminal District Court, Parish of Orleans, State of Louisiana, for certain search warrants and arrest warrants. These applications, which were sworn to by affiant on October 2, 1963, in the presence of Judge Brahney, were for warrants to search the premises occupied by the Southern Conference Educational Fund, Inc., the home and automobile of James A. Dombrowski, as well as other residences occupied by persons involved in the management and control of the Southern Conference Educational Fund, Inc. In addition and at the same time applications for the arrest of James A. Dombrowski, Bruce C. Waltzer and Benjamin E. Smith were sworn to by affiant [fol. 86] and Jack N. Rogers, Esq., in the presence of Judge Brahney. Based upon such sworn applications Judge Brahney held that probable cause existed for the issuance of the search warrants and warrants of arrest and he thereupon signed and issued them.

That the aforesaid search warrants and warrants of arrest were executed by the affiant and other police officers under his command acting in their official capacities, on October 4, 1963, by the arrest of James A. Dombrowski and others and the seizure of the books, records and files belonging to or identified with James A. Dombrowski and the management and control of the Southern Conference Educational Fund, Inc.

That shortly after the seizure of the books, records and files above described the State of Louisiana Joint Legislative Committee on Un-American Activities through its chairman, James H. Pfister, by subpoena served upon affiant, commanded affiant forthwith to deliver to said committee at New Orleans, Louisiana, all of the books, records and files of the Southern Conference Educational Fund, Inc., and of James A. Dombrowski, plus all communist political propaganda and communist party records, plus any other documentary evidence of subversive activities

then in affiant's possession or legal custody as a result of the aforesaid seizures. Affiant did then and there make delivery of the seized material to Mr. Jack N. Rogers, counsel for the Committee, and Colonel Frederick B. Alexander, Staff Director, pursuant to the subpoena issued by the Legislature of the State of Louisiana through the Joint Legislative Committee on Un-American Activities and duly served on affiant.

Affiant further states that subsequent to the delivery of the seized material to the Joint Legislative Committee on Un-American Activities, to wit, on October 5, 1963, subpoenas were issued by Senator James O. Eastland, Chairman, Committee on Judiciary and Sub-Committee on In- [fol. 87] ternal Security of the Congress of the United States, directed to James H. Pfister, Chairman, Jack N. Rogers, Counsel, and Colonel Frederick B. Alexander, Jr., Staff Director of the Joint Legislative Committee on Un-American Activities, State of Louisiana, commanding the individuals named to deliver to said Committee of the United States Congress all documents, books, letters, papers, etc., seized on October 4, 1963, from James A. Dombrowski and Southern Conference Educational Fund, Inc. In compliance with said subpoenas all materials then in custody of the Louisiana Joint Legislative Committee on Un-American Activities were delivered on October 5, 1963, to the custody of the Honorable J. G. Sourwine, Chief Counsel, Internal Security Sub-Committee of the United States Senate.

Affiant has never met Senator James O. Eastland nor has he had any communication with him directly or indirectly at any time, nor had he ever met Mr. J. G. Sourwine or communicated with him directly or indirectly until October 5, 1963, when the subpoenas of the Senate Internal Security Sub-Committee were served on Mr. Pfister, Mr. Rogers and Colonel Alexander. Neither Senator Eastland nor Mr. Sourwine had anything whatever to do with the aforesaid applications for search warrants and arrest warrants or with the execution of such warrants. Neither of

them consulted with affiant in advance of the applications for the warrants or the execution thereof, nor did they participate in any way in the determination by the Louisiana authorities to obtain and execute such warrants.

Affiant specifically states that at no time did he ever agree, plan or act in concert with Senator Eastland or Mr. Sourwine to seize the books, records and papers of the Southern Conference Educational Fund, Inc., and James A. Dombrowski in order that they might thereafter be obtained by the Internal Security Sub-Committee of the [fol. 88] United States Senate by way of subpoenas of that Committee.

Russell R. Willie, Major, Louisiana State Police.

Sworn to and Subscribed before me at Baton Rouge, Louisiana, this 3rd day of January, 1964.

Jack N. Rogers, Notary Public.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF MRS. LAURA NICHOLSON (FILED AS EXHIBIT 5 TO DEFENDANTS' MOTION)

State of Louisiana,
Parish of East Baton Rouge, ss.:

Before me, the undersigned authority, personally came and appeared: Mrs. Laura Nicholson, who, having been duly sworn, did depose and say: I am an employee of the Joint Legislative Committee on Un-American Activities of the Louisiana State Legislature, and more particularly, employed as secretary to Colonel Frederick B. Alexander, Jr., Staff Director of that Committee. I have been so employed since December 1, 1962. My office address is Room 214, Old State Capitol Building, Baton Rouge, Louisiana.

On the afternoon of Saturday, October 5, 1963, our office was officially closed and I was at home when I received a call from Jack N. Rogers, Esq., Counsel to the Joint Legis-

lative Committee on Un-American Activities. Mr. Rogers asked me if I could come down to the office at Room 214, Old State Capitol Building, Baton Rouge, Louisiana, and do some special work, and I said I would. I thereupon went to the office of the Committee, and when I arrived Mr. Rogers and a gentleman who was introduced to me as Mr. J. G. Sourwine were there. Mr. Sourwine produced several [fol. 89] blank subpoenas bearing the signature of Senator James O. Eastland, Chairman of the Committee on the Judiciary and Sub-Committee on Internal Security, United States Senate. Mr. Sourwine handed me the United States Senate blank subpoenas bearing Senator James O. Eastland's signature and asked me to fill them in so that they would call for the production of the same records that were covered by subpoenas of the Joint Legislative Committee on Un-American Activities of the Louisiana State Legislature, which subpoenas I understand had been served upon Major Russell R. Willie of the Louisiana State Police on the preceding day, October 4, 1963. Mr. Sourwine dictated the names of the individuals to whom his subpoenas were to be directed and the other words that were to be filled in on the United States Senate subpoenas down to the description of the records which were to be covered by those subpoenas. He thereupon told me to take these descriptions from the subpoenas of the Louisiana State Committee dated October 4, 1963. This I did. I also filled in the date at the bottom of each Senate subpoena. I typed the date as the "4th day of October," 1963, taking this date also from the date of the Louisiana State subpoenas. Although I inserted the date in the Senate subpoenas as the "4th day of October," 1963, the fact of the matter is that I typed these subpoenas, including the dates thereon, on Saturday, the 5th day of October, 1963. On that same occasion I also typed several letters from Mr. Sourwine to Colonel Tom Burbank, Commanding Officer of the Louisiana State Police. These letters related to the arrangement whereby Colonel Burbank was to act for the United States

Senate Committee as custodian of the records covered by that Committee's subpoenas. These letters were all dated October 5, 1963, the date when they were typed. These letters referred to the Senate Committee's subpoenas of "Oc-
[fol. 90] tober 4, 1963," but here again those subpoenas were in fact typed by me on October 5, 1963.

Mrs. Laura Nicholson.

Sworn to and subscribed before me at Baton Rouge, Louisiana, this 3rd day of January, 1964.

Jack N. Rogers, Notary Public.

IN UNITED STATES DISTRICT COURT

STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL RULE 9(h)

The material facts involved in this action are set forth in the affidavits filed as part of this motion. For purposes of the motion, the material facts will be summarized in paragraphs 3, *et seq.* hereof.

1. Plaintiff James A. Dombrowski is a resident of the State of Louisiana and a citizen of the United States.[1]

2. Plaintiff Southern Conference Educational Fund, Inc. is a corporation which maintains an office for business purposes in the State of Louisiana.[2] A report of the Senate Internal Security Subcommittee published in 1955 disclosed that the Southern Conference Educational Fund, Inc. was the successor to the Southern Conference for Human Welfare, a communist-front organization.

3. The defendant James O. Eastland is a United States Senator from Mississippi and Chairman of the Committee

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[1] Complaint, p. 1.

[2] Complaint, p. 1.

[fol. 91] on the Judiciary of the United States Senate and of the Subcommittee on Internal Security.[3]

4. The defendant J. G. Sourwine is Chief Counsel of the Subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate.[4]

5. The other persons and parties named as defendants in this cause have not been served with process within the District of Columbia and therefore are not within the jurisdiction of this Court.[5]

6. James H. Pfister is a member of the House of Representatives of the Legislature of the State of Louisiana and has been Chairman of the Joint Legislative Committee on Un-American Activities for the State of Louisiana.[6]

7. The Joint Legislative Committee on Un-American Activities, which shall hereinafter be referred to as the "Joint Committee," was constituted by House Concurrent Resolution No. 13 of the 1960 Legislature. This resolution was unanimously adopted by the House of Representatives and by the Senate of Louisiana and was approved by Governor Jimmie H. Davis in July, 1960.[7]

8. House Concurrent Resolution No. 13,[8] requires, inter alia, that the Joint Committee "shall study, investigate and [fol. 92] analyze all facts relating directly or indirectly * * * to the activities of groups and organizations which have as their objectives, or as part of their objectives, the overthrow of the State of Louisiana, or of the United States by force, violence or other unlawful means; to all

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[3] Exhibit 6, p. 1.

[4] Exhibit 7, p. 1.

[5] Court record.

[6] Exhibit 1, pp. 1 and 2.

[7] Exhibit 1, p. 1.

[8] A copy of this resolution is Exhibit A to the affidavit of Representative Pfister.

organizations known to be or suspected of being dominated or controlled by a power seeking to impose a foreign political theory upon the government and people of the United States; to all persons who belong to or are affiliated with such groups or organizations; * * * *."

9. The Resolution, which recognizes the necessity and desirability of legislation to meet the foregoing problems, also authorized the Joint Committee to co-operate with local law enforcement authorities and similar committees of other States and of the Federal Government.[9]

10. Jack N. Rogers became counsel for the Joint Committee in March of 1961 and both he and Representative Pfister have served with the Joint Committee in their respective capacities from the date of entering into their respective offices continuously up to and including the date of the filing of this motion.[10]

11. Some time during 1962 the Joint Committee became interested in the activities of the Southern Conference Educational Fund, Inc. This organization, which hereinafter shall be referred to as SCEF, was at that time and is now located at 822 Perdido Street, New Orleans, Louisiana.[11]

12. The Joint Committee's interest in SCEF arose out of the fact that the Committee knew of the report published [fol. 93] in 1955 by the Internal Security Subcommittee of the United States Senate in which SCEF was found to be a communist front.[12]

13. In carrying out its legislative responsibilities, the Joint Committee instructed its Staff Director, Colonel Frederick B. Alexander and its Committee Counsel, Jack

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[9] *Id.;* fourth Whereas clause; paragraph (c) and paragraph (d).

[10] Exhibit 2, p. 1; Exhibit 1, p. 2.

[11] Exhibit 1, p. 2; Exhibit 2, p. 3.

[12] Exhibit 1, p. 2; Exhibit 2, p. 3; also see Exhibit 7, pp. 2 and 3.

N. Rogers, to have the Committee staff conduct an investigation of SCEF as required by House Concurrent Resolution No. 13.[13]

14. The investigation was undertaken and, as part thereof, Mr. Rogers was authorized by the Joint Committee to go to Washington, D. C. to consult with the Internal Security Subcommittee of the United States Senate in matters bearing upon the mutual responsibilities of the two committees.[14]

15. The investigation conducted by the staff of the Joint Committee prior to October, 1963 disclosed that the direction and control of SCEF and its publication, *The Southern Patriot,* were in the hands of persons who, at various times, had been identified by witnesses under oath as communists. Among such persons were James A. Dombrowski, Executive Director of SCEF; Aubrey Williams, President Emeritus; Carl Braden, Field Organizer, and formerly Field Secretary of SCEF and Editor of *The Southern Patriot;* Ann Braden, Editor of *The Southern Patriot,* and formerly Field Secretary; and William Howard Melish, Eastern Representative of SCEF; and Benjamin E. Smith, Treasurer of SCEF, who was also a national [fol. 94] board member of the National Lawyers Guild, an identified communist-front organization.[15]

16. During the course of the Joint Committee investigation, Mr. Rogers requested the Internal Security Subcommittee of the United States Senate to furnish him with such information as that Subcommittee could properly give relating to SCEF. This request was made by Mr. Rogers of Mr. J. G. Sourwine, counsel of the Senate Subcommittee, on or about July 17, 1963. In response to the request, Mr. Sourwine furnished Mr. Rogers certain rele-

[13] Exhibit 1, p. 2; Exhibit 2, p. 3.

[14] Exhibit 1, p. 2; Exhibit 2, p. 3.

[15] Exhibit 2, p. 3.

vant information from the public records of the Subcommittee bearing upon the activities of SCEF.[16]

17. At that time, Mr. Rogers advised Mr. Sourwine that at some future date the Joint Committee of the Louisiana Legislature might subpoena the records of SCEF, and if this were done, any material uncovered relating to the responsibilities of the Senate Internal Security Subcommittee would be brought to the attention of Mr. Sourwine.[17]

18. At a later date, some time about the middle of September, 1963, Mr. Rogers telephoned Mr. Sourwine to inquire regarding whether he and Mr. Ben Mandel, Research Director of the Senate Committee, could possibly come to Louisiana to help evaluate the material contained in the records of SCEF in the event the Joint Committee of the Louisiana Legislature subpoenaed such records.[18]

19. Mr. Sourwine discussed the inquiry made by Mr. Rogers with Senator Eastland who advised Mr. Sourwine [fol. 95] that his judgment would have to be based upon what was found in the records; that if they should appear to be within the scope of the investigative authority of the Senate Committee, then he and Mr. Mandel might go to Louisiana to look at them. Senator Eastland emphasized to Mr. Sourwine that the Senate Committee had no interest in any debates or activities in which SCEF might have engaged with respect to civil rights or racial matters; that the Committee was interested only in material relating to communist or communist-front activities, especially communist infiltration of mass organizations and the financing of communist fronts.[19]

20. The investigative inquiry carried out by the Joint Committee staff included, among other things, an examina-

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[16] Exhibit 2, p. 3; Exhibit 7, p. 3.

[17] Exhibit 2, p. 3; Exhibit 7, p. 3.

[18] Exhibit 2, pp. 3 and 4; Exhibit 7, p. 3.

[19] Exhibit 7, pp. 3 and 4.

tion of the files of the Louisiana State Police authorities and other Louisiana police agencies relating to the activities and programs of SCEF.[20]

21. In September, 1963, after the Joint Committee investigation had been substantially carried forward, Colonel Alexander and Mr. Rogers informed the Joint Committee of the facts known to them relating to SCEF uncovered by the staff investigation up to that point. Mr. Rogers expressed to the Joint Committee his opinion that the operations and activities of SCEF were in violation of the Louisiana criminal statutes relating to subversive activities.[21]

22. The Joint Committee concurred in this opinion and instructed Mr. Rogers and Colonel Alexander to take the [fol. 96] SCEF matter up with the Louisiana State Police authorities.[22]

23. Pursuant to the directions of the Joint Committee, Mr. Rogers contacted Colonel Thomas D. Burbank, Superintendent, Louisiana State Police, on or about September 20, 1963. The facts relating to SCEF known to the Joint Committee were presented to Colonel Burbank with the request that he have the State Police obtain and execute search warrants for the offices of SCEF and the residential premises occupied by James A. Dombrowski and certain other officers of SCEF.[23]

24. Colonel Burbank agreed to take action and designated Major Russell R. Willie to be the officer in charge of the matter. Major Willie is a Louisiana State Police Officer whose primary duty at that time was and still is, Supervisor of the Bureau of Identification of the State Police.

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[20] Exhibit 2, p. 4.

[21] Exhibit 2, p. 4; Exhibit 1, p. 2.

[22] Exhibit 1, p. 2; Exhibit 2, p. 4.

[23] Exhibit 2, p. 4; Exhibit 3, pp. 1 and 2.

Among the functions performed by his Bureau are the maintenance of fingerprint records, the receipt and classification of all material dealing with known and suspected subversive organizations as well as individuals known to belong to or associate with said organizations. In addition, pursuant to the provisions of Louisiana State law, all communists in the State of Louisiana and all individuals there who are knowingly members of a communist-front organization as defined in the Louisiana statutes, are required to register with the Department of Public Safety, which is under Major Willie's immediate supervision.[24]

[fol. 97] 25. During his conversation with Colonel Burbank, Mr. Rogers offered to assist the Louisiana State Police in obtaining warrants and his offer was accepted.[25]

26. On October 2, 1963, Major Willie and Mr. Rogers appeared before the Honorable Thomas M. Brahney, Jr., Judge, Criminal District Court, Parish of Orleans where Major Willie swore to applications for search warrants for the offices of SCEF and the residences of James A. Dombrowski, Benjamin E. Smith and Bruce C. Waltzer, all of whom were active in the control of SCEF. At the same time, Major Willie and Mr. Rogers, together, swore to applications for arrest warrants for the three named individuals.[26]

27. Being satisfied that probable cause existed, Judge Brahney signed and issued the aforementioned warrants.[27]

28. The warrants were executed on October 4, 1963 by Louisiana State Police and New Orleans Police, all of whom were under the direction and supervision of Major Willie. The materials described in the search warrants

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[24] Exhibit 2, p. 4; Exhibit 3, p. 2; Exhibit 4, pp. 1 and 2.

[25] Exhibit 2, p. 4; Exhibit 4, p. 2.

[26] Exhibit 2, p. 4; Exhibit 4, p. 2.

[27] Exhibit 2, p. 4; Exhibit 4, p. 2.

were seized and the three individuals named in the arrest warrants, one of whom was James A. Dombrowski, were arrested. Execution of the warrants was accomplished pursuant to the orders set forth in the warrants.[28]

29. After the warrants had been executed, Mr. Rogers promptly made a preliminary examination of the material [fol. 98] and records seized by the Louisiana State Police and New Orleans Police.[29]

30. After his examination, Rogers communicated with Representative Pfister, Chairman of the Joint Committee of the Louisiana Legislature, and in response to Rogers' request, Mr. Pfister went to the New Orleans Police Academy, New Orleans, Louisiana, where he met and talked with Rogers.[30]

31. Rogers informed Pfister of the seizure by the police authorities of the books, records and documents of SCEF and of the nature of some of the documents. Representative Pfister, as Chairman of the Joint Committee of the Louisiana Legislature, thereupon authorized Rogers to serve a Joint Committee subpoena upon the appropriate police authority to require the production before the Joint Committee of all the books, records and documents seized from SCEF.[31]

32. Pursuant to the authority given to him by Chairman Pfister, Rogers served a subpoena duces tecum upon Major Willie of the Louisiana State Police, requiring the forthwith production before the Joint Committee of all of the material seized from SCEF.[32]

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[28] Exhibit 2, p. 4; Exhibit 3, p. 2; Exhibit 4, pp. 2 and 3.

[29] Exhibit 2, p. 5.

[30] Exhibit 1, pp. 2 and 3.

[31] Exhibit 1, pp. 2 and 3.

[32] Exhibit 2, p. 5; Exhibit 4, p. 3.

33. Thereupon, Major Willie, in response to the subpoena, transported the seized material to Baton Rouge, Louisiana where it was retained by the State Police as custodians for the Joint Committee.[33]

[fol. 99] 34. That evening, to wit—October 4, 1963, at about 10:30 P. M., Mr. Rogers telephoned Mr. Sourwine at his home in the metropolitan area of the District of Columbia and informed Sourwine that the SCEF material then under subpoena to the Joint Committee would be of great interest to the Internal Security Subcommittee. Rogers urged that Mr. Sourwine and Mr. Mandel come to Baton Rouge, Louisiana for the purposes of assisting in the evaluation of the seized material as soon as possible. Mr. Sourwine advised Mr. Rogers that he and Mr. Mandel would try to be in Baton Rouge the following day, October 5, 1963.[34]

35. On the following morning, Mr. Mandel and Mr. Sourwine left the District of Columbia area and flew to New Orleans, Louisiana and then drove to Baton Rouge, Louisiana where they met Mr. Rogers.[35]

36. Rogers and Colonel Alexander informed Sourwine of the nature of the documents which had been secured from SCEF and the content of certain particular documents whereupon Mr. Sourwine concluded that the records of SCEF in possession of the Joint Committee included a substantial quantity of material which would be of interest to the Internal Security Subcommittee of the United States Senate in pursuance of its investigative functions within the limits of the directive which had been given him by Senator Eastland.[36]

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[33] Exhibit 4, p. 3; Exhibit 2, p. 5; Exhibit 3, p. 3.

[34] Exhibit 2, p. 5; Exhibit 7, p. 4.

[35] Exhibit 2, p. 5; Exhibit 7, p. 4.

[36] Exhibit 7, p. 4.

37. Mr. Sourwine thereupon telephoned Senator Eastland, reported his conclusion to the Senator and recommended that all the material obtained by the Joint Com-
[fol. 100] mittee be subpoenaed from that committee by the Senate Internal Security Subcommittee. Senator Eastland authorized Mr. Sourwine to issue subpoenas for the material and thereafter, on the same day, October 5, 1963, Sourwine served subpoenas duces tecum upon Chairman Pfister, Mr. Rogers and Colonel Alexander, all of the Joint Committee, calling for the production of all the material seized from SCEF.[37]

38. Upon service of the subpoena duces tecum of the Senate Internal Security Subcommittee on October 5, 1963, Mr. Sourwine took possession, on behalf of the Subcommittee, of all the SCEF material then in the hands of the Joint Committee of the Louisiana Legislature.[38]

39. Sourwine then arranged with Colonel Thomas D. Burbank to hold this material as custodian for the Senate Subcommittee.[39]

40. Pending transportation of the SCEF material to Washington, D. C., access to the material was allowed to the Joint Committee.[40]

41. Subsequently, two staff members of the Internal Security Subcommittee brought the material to the Subcommittee's office in Washington, D. C. where, pursuant to the resolution adopted by the Subcommittee on Internal Security of the United States Senate on November 14, 1963,

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[37] Exhibit 7, pp. 4 and 5; Exhibit 6, p. 2; Exhibit 4, pp. 3 and 4; Exhibit 3, p. 3; Exhibit 2, p. 5; Exhibit 1, p. 3.

[38] Exhibit 7, p. 5.

[39] Exhibit 2, p. 5; Exhibit 3, p. 3; Exhibit 7, p. 5.

[40] Exhibit 1, p. 3; Exhibit 2, p. 5.

a copy of which resolution is attached to Senator East-
[fol. 101] land's affidavit, a process of evaluating the material was undertaken.[41]

42. On November 8, 1963, the Joint Committee of the Louisiana Legislature held hearings involving SCEF at which time copies of many of the documents seized from SCEF were introduced into evidence. Upon the basis of the evidence produced, the Joint Committee resolved as a legislative finding that SCEF was a communist front and a subversive organization aiding and abetting the communist conspiracy.[42]

43. Neither Senator James O. Eastland nor Mr. J. G. Sourwine had anything whatsoever to do with the acquisition of the SCEF material by the Joint Committee of the Louisiana Legislature or with the preparation, issuance or execution of the arrest and search warrants whereunder the Louisiana authorities obtained the material of SCEF which was later subpoenaed by the Senate Internal Security Subcommittee.[43]

44. Otherwise than stated in this Statement of Material Facts and the exhibits hereto, neither Senator Eastland nor Mr. Sourwine had anything to do with the activities of the Louisiana authorities, be they legislative or executive, insofar as such activities related to James A. Dombrowski or SCEF, or had any knowledge of such activities.[44]

[fol. 102] 45. At all times pertinent hereto, Senator James O. Eastland and Mr. J. G. Sourwine acted in their

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[41] Exhibit 7, p. 5; Exhibit 6, p. 1 and exhibit thereto.

[42] Exhibit 1, p. 3; Exhibit 2, pp. 5 and 6.

[43] Exhibit 7, pp. 6 and 7; Exhibit 6, p. 2; Exhibit 4, p. 4; Exhibit 3, p. 4; Exhibit 2, p. 6; Exhibit 1, p. 3.

[44] See all exhibits.

official capacities as officers of the United States Government.[45]

David C. Acheson, United States Attorney, Joseph M. Hannon, Assistant United States Attorney.

Roger Robb, of Counsel.

IN UNITED STATES DISTRICT COURT

EXCERPTS FROM DEPOSITION OF WALTER E. DILLON, JR.

Q. Now would you give us your full name, Mr. Dillon, for the record?

A. Walter E. Dillon, Junior.

Q. And your address, please, sir?

A. 1625 I Street, Northwest, Washington 6, D. C.

Q. And you are a lawyer, a member of the Bar of the District?

A. Yes.

Q. You are of counsel for the plaintiffs in this case?

A. Yes.

Q. And are you the same Mr. Walter E. Dillon, Jr., who signed and swore to the complaint in this case?

A. Yes.

Q. Your affidavit reads as follows:

District of Columbia, ss: Walter E. Dillon, Jr., being duly sworn, says that he has read the foregoing complaint by him subscribed, that he knows the contents thereof, and that the matters and things therein stated he verily believes to be true.

[fol. 103] Subscribed and sworn to before me this 31st day of October, 1963.

And a signature which is—which I cannot read, and Notary Public.

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[45] Deposition of J. G. Sourwine, p. 77 and Exhibits 6 and 7.

That was the affirmation to which you subscribed?

A. Yes.

Q. Now, did you mean by that, Mr. Dillon, that you had no personal knowledge of the matters and things which are stated in the complaint?

A. I meant what it says.

Q. Well, do you or did you have any personal knowledge of the matters and things stated in the complaint?

Mr. Kinoy: I think, Mr. Robb, I am going to object to that question.

I fail to see the total relevancy of the interrogation.

Mr. Dillon, the record shows, is one of the attorneys of record in this matter. He verified this pleading pursuant to Rule 6 of the Rules of Civil Procedure of the District of Columbia, perfectly proper verification. It is obvious that any information whatsoever with respect to the four corners of this complaint, the issue involved here, come to Mr. Dillon as an attorney in this matter, and it would appear to me to be totally improper and in violation of the relationship between attorney and counsel to interrogate him at this point as to any of the facts whatsoever which come to his knowledge as an attorney in this case.

I think that any information which you would attempt to receive pursuant to this question would be not admissible and would be very improper.

Mr. Robb: This is a deposition for the purpose of discovery, Mr. Kinoy.

I'm asking Mr. Dillon whether or not he based this affidavit upon information he had received and whether it [fol. 104] was made as of his personal knowledge.

Mr. Kinoy: Well, I have made my objection very clear and it's up to Mr. Dillon who is an attorney to make his own decision as to whether he should answer the question.

The Witness: I'll answer the question.

Let me answer it this way. The information contained in that complaint came to me from three sources, actually four sources; primarily through the law offices of Kunstler, Kunstler and Kinoy, of which Mr. Kinoy here is a member.

I received a call from William Kunstler, an attorney known by me and with whom I have worked closely for many years on other cases, and he related to me many of the facts contained in the complaint.

Mr. Kinoy, I believe—I believe it was a conference call or both of them were on the phone in the offices of Kunstler, Kunstler and Kinoy.

By Mr. Robb:

Q. That's in New York, Mr. Dillon?

A. Pardon?

Q. That's in New York? I say it's in New York?

A. That's in New York City.

And I also received two affidavits, one which is part of the record in the case, one from Mr. Dombrowski and one from Mr. Brener.

And on the basis of that I verified—I stated an opinion that I believed the facts to be true.

Q. And those were the three sources?

A. Four sources.

Q. Four sources. Four?

A. William Kunstler, Kunstler and Kinoy—

Q. I get it. There were no others, is that correct?

A. Mr. Brener and Mr. Dombrowski.

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[fol. 104a]

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18435, 18544

JAMES A. DOMBROWSKI, et al., Appellants,

v.

COLONEL THOMAS D. BURBANK, et al., Appellees.

APPENDIX FOR APPELLEES

[fol. 104b]

IN UNITED STATES DISTRICT COURT

DOCKET ENTRIES

1963

October 31.....Complaint filed.

October 31.....Motion of plaintiff for preliminary injunction filed. Affidavits (2).

October 31.....Motion for temporary restraining Order denied.

November 27.....Summons and copies of complaint and points and authorities in support of motion for preliminary injunction to United States Attorney and Attorney General. D.A. served 11/29/63.

December 6.....Opposition of Defendants Eastland and Sourwine to Motion for Preliminary Injunction: Affidavits (2) Exhibit "a".

December 14.....Notice by plaintiffs to take deposition of Defendant Sourwine.

December 16.....Proposed withdrawal of Motion for Preliminary Injunction.

December 18.....Order denying plaintiff's Motion for Preliminary Injunction; dismissing so much of complaint which seeks permanent injunctive relief.

December 26.....Notice of Appeal by plaintiff from Order 12/18/63.

1964

January 9.....Deposition of Julian G. Sourwine filed.

January 28.....Motion of Defendants Eastland and Sourwine to Dismiss or for Summary Judgment Exhibit (7); Statement; Points and Authorities.

February 10.....Points and Authorities of Plaintiffs in opposition to motion of defendants Eastland and Sourwine to Dismiss or in the Alternative for a Summary Judgment; Affidavits (2).

March 5.....Affidavit of Arthur Kinoy; exhibit.

March 10.....Reply of Defendants Eastland and Sourwine to plaintiffs' answer to defendants' motion to dismiss or in the alternative for summary judgment.

March 26.....Order granting summary judgment for defendants Eastland and Sourwine.

April 3.....Notice of Appeal by plaintiffs from Order 3/26/64.

[fol. 104c]

IN UNITED STATES DISTRICT COURT

Minute Entry, April 20, 1964. Ainsworth, J.

No. 13967, Civil Action, Division D

JAMES A. DOMBROWSKI, et al.,

versus

COLONEL THOMAS D. BURBANK, et al.

This matter came on for hearing on a former day on motions of defendants, Thomas D. Burbank and Russell R. Willie, to dismiss. The court, having heard the argument of counsel and having considered the briefs and affidavits in support thereof, is now ready to rule.

It Is Ordered that motion of Thomas D. Burbank be, and the same is hereby, *granted.*

It Is Further Ordered that motion of Russell R. Willie be, and the same is hereby, *denied.*

Reasons

An examination of the affidavits filed herein by mover and respondents indicates that there is a sharp dispute between the parties and a genuine issue as to material facts in connection with the activities of the defendant, Major Willie. Trial on the merits is therefore necessary to resolve this dispute and a case is not ripe for summary judgment where a dispute of this kind exists. The affidavits make this especially true with regard to the manner and method of the execution by this defendant of the search warrants and warrants of arrest. Rule 56, Fed. R. Civ. P. See *National Screen Service Corp.* v. *Poster Exchange, Inc.*, 5 Cir., 1962, 305 F. 2d 647.

[fol. 104d] But the same is not true as to the defendant, Burbank, who, though Superintendent of State Police and therefore the highest officer in that department, nevertheless had no contact with the investigation of the activities of Southern Conference Educational Fund, Inc., and according to his affidavit, was not aware of any contemplated action against the Fund until informed by Mr. Rogers, counsel for the Legislative Committee. The Superintendent then required that Mr. Rogers advise Governor Davis of the proposed operations by the State Police and insisted that Mayor Schiro of New Orleans be informed of the contemplated action and his concurrence had. Beyond instructing Major Willie to cooperate with the Joint Legislative Committee's legal counsel and staff, Superintendent Burbank had no further connection with the complained of activities of the police. According to his affidavit, he was not informed of the contents of the applications for search warrants and in no way participated personally in the activities and did not know that they had been issued until the day after their issuance; he took no part personally in any of the activities in connection with the execution of

the warrants. It is true that under the direction of Mr. J. G. Sourwine, counsel for the United States Senate Subcommittee, he caused the material seized by the police to be transported to the Chancery Clerk of Woodville, Mississippi. However, this action is not an issue in this suit, and according to the Burbank affidavit, it was done at the direction of Senator Eastland's committee. The affidavit is in no way controverted by plaintiff and stands undisputed except that plaintiff's counsel in his brief maintains that it is "unthinkable that the conduct of the raids was not with the approval of Colonel Burbank." However, the Burbank affidavit is undisputed and we can see no justification for requiring him to continue as a defendant with the facts showing that he had nothing to do with nor was he aware of the alleged tortious acts.

[fol. 105]

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,435

No. 18,544

JAMES A. DOMBROWSKI, et al., Appellants,

v.

COLONEL THOMAS D. BURBANK, et al., Appellees.

Appeals from the United States District Court for the District of Columbia

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Mr. William M. Kunstler and *Mr. Milton E. Brener*, of the bar of the Supreme Court of Louisiana, *pro hac vice*, by special leave of court, with whom *Mr. Walter E. Dillon, Jr.*, was on the brief, for appellants.

Mr. Roger Robb and *Mr. Joseph M. Hannon,* Assistant United States Attorney, with whom *Mr. David C. Acheson,* United States Attorney at the time the brief was filed, *Messrs. Frank Q. Nebeker* and *Alan Kay,* Assistant United States Attorneys, were on the brief, for appellees Eastland and Sourwine.

Before WASHINGTON, *Senior Circuit Judge,* and BURGER and MCGOWAN, *Circuit Judges.*

[fol. 106] OPINION—February 4, 1966

Per Curiam: The appellants in this case are a Louisiana civil rights organization and its executive director. Their complaint in the District Court sought injunctive relief and damages under 42 U.S.C. §§ 1983 and 1985. The first of these appeals, No. 18,435, is from an order dismissing the claim for injunctive relief. The second, No. 18,544, is from the grant of appellees'[1] motion for summary judgment on the claim for damages.

The complaint alleged in substance that various Louisiana officials, in league with appellees, illegally searched the offices of appellants and seized documents and records.[2] These papers, while in the possession of the Louisiana officials, were subjected to a subpoena issued in the name of the United States Senate Internal Security Subcommittee. Compliance with this subpoena resulted in the transfer of the seized papers to the custody of the Senate

[1] Although the complaint named a number of defendants, most of these appear to be residents of Louisiana upon whom service of process was not effected. Appellees are the only two defendants who were served; and they are, respectively, the Chairman and the Chief Counsel of the United States Senate Internal Security Subcommittee.

[2] A detailed description of this action is contained in *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965). The Supreme Court in that case, decided while the instant appeals were under submission, invalidated the Louisiana statute under which the Louisiana officials purported to act, and directed that the relief to be afforded by the District Court in Louisiana should include "ordering immediate return of all papers and documents seized."

Subcommittee which, in plenary session, made provision for their handling by the resolution set forth in the margin.[3] Appellants, asserting that the subpoena was deficient in [fol. 107] authority from the Subcommittee, seek damages, as well as an injunction requiring appellees to return their records and to refrain from using them.

No. 18,435

Appellants' complaint alleged that the seized materials [fol. 108] were in the possession of appellees. However,

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[3] The full entry in the Subcommittee's minutes is as follows:

November 14, 1963

Upon the conclusions of the testimony of the second of two witnesses heard in executive session, the Subcommittee considered and discussed the handling of material subpoenaed from the Joint Legislative Committee on Un-American Activities of the State of Louisiana.

Present: Senators Eastland, Dodd, Hruska, Dirksen, and Scott.

After discussion, and on motion of Senator Dirksen, it was ORDERED that the Chairman be authorized to appoint a Task Force consisting of Senators Eastland, Johnston, Dodd, Hruska and Scott to evaluate the subpoenaed material progressively with respect to its value to the Subcommittee's investigation and to make determination from time to time respecting particular papers, documents, or other material to be inserted verbatim in the record of the Subcommittee; that all of the material not clearly irrelevant to the Subcommittee's investigation of Communist activity generally, of Communist front activity, of Communist infiltration of organizations and groups, and/or the source of funds for Communist or Communist front activities be ordered into the Committee's hearing record by reference subject to the later determination of the Task Force respecting particular items which should be entered into the record verbatim; and that all of the original records obtained under the subpoena be photostated for the permanent records of the Subcommittee and, when so photostated, be returned promptly to the possession of the Joint Legislative Committee on Un-American Activities of the State of Louisiana.

James O. Eastland Chairman

I consent and agree to the foregoing procedure.

John F. McClellan
Olin D. Johnston
Roman L. Hruska

the affidavits submitted in opposition to appellants' motion for a preliminary injunction revealed that the Senate Subcommittee had incorporated the documents in its hearing record and made express provision for their examination and disposition by the collective act of the Subcommittee. See note 3 *supra*.

Since the seized materials must thus be regarded as in the possession of the Senate Subcommittee,[4] a judicial command addressed solely to appellees—one member of the Subcommittee and one of its staff—cannot be assured of effect. The test, set forth by the Supreme Court in *Williams* v. *Fanning*, 332 U.S. 490, 494 (1947), of the indispensability of a superior to a suit for injunctive relief against a subordinate is whether "the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." *Cf. Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 (1949). Of course, there is only partly present in this case a relationship between a superior and a subordinate official as there was in *Williams;* nevertheless, the problem of requiring a subordinate official to undertake acts capable of [fol. 109] accomplishment only by his superior, which seems central to the purpose of the *Williams* test, also characterizes the difficulties implicit in requiring either of

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[4] Appellants contend that the trial court, in dismissing the prayer for injunctive relief, should have limited its consideration to the allegations of the complaint. Reliance is placed upon *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U.S. 485 (1900), for the proposition that all of the allegations of the complaint must be regarded as true on a motion to dismiss a bill in equity on its face. But even in *Mast, Foos & Co.*, the Court regarded consideration of affidavits as appropriate. 177 U.S. at 495. See also Rule 12, FED. R. CIV. P.; MOORE, FEDERAL PRACTICE ¶ 12.09 (2d ed. 1964). What the Court disapproved was dismissal when a question of fact was involved. On this record, in light of the affidavit setting out the Subcommittee resolution, the dismissal does not involve the resolution of any question of fact which may fairly be regarded as disputed.

the appellees to return documents held by the full Senate Subcommittee.[5]

The dismissal of appellants' request for injunctive relief to prevent appellees from using the seized records also flows from the undisputed fact that the materials are in the custody of the Subcommittee. Since the documents are now held by the Subcommittee, they are accessible to the appellees only by virtue of their official positions with that body. We cannot prohibit, nor are we asked to prohibit, appellees' use of the documents in the course of their official business for the Subcommittee; and neither do appellants seek any restraint upon the Subcommittee itself. See *Hearst* v. *Black,* 66 U.S.App.D.C. 313, 87 F.2d 68 (1936), where this court refused to enjoin a congressional committee from using information it had obtained by illegal means. There, considerations resting upon a proper allocation of powers and responsibilities among the coordinate branches of the federal system impelled this court not to exercise its equity powers.[6] In any event, however, the relief requested here is directed solely at appellees. Disclosure of the documents in the course of the Subcommit- [fol. 110] tee's official action would not be prevented by the decree prayed for against appellees; and all other members of the Subcommittee would still have unfettered use of the documents. "A court of equity may refuse to give any relief when it is apparent that that which it can give

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[5] See also *Blackmar* v. *Guerre,* 342 U.S. 512 (1952). That was a suit for reinstatement by a discharged government employee. Because the Civil Service Commissioners were not parties to the suit, and the only defendant before the court could not grant the requested relief without their approval, the Court held that dismissal of the suit was proper.

[6] See also *Jordan* v. *Hutcheson,* 323 F.2d 597 (4th Cir. 1963); *Pauling* v. *Eastland,* 109 U.S.App.D.C. 342, 288 F.2d 126, *cert. denied,* 364 U.S. 900 (1960); *Mins* v. *McCarthy,* 93 U.S.App.D.C. 220, 209 F.2d 307 (1953). See generally *Developments in the Law-Remedies Against the United States and Its Officials,* 70 HARV. L. REV. 827 (1957).

will not be effective or of no benefit to the plaintiff." *Virginia Ry.* v. *System Federation No. 40,* 300 U.S. 515, 550 (1937).

No. 18,544

Appellees contend that the grant of their motion for summary judgment was proper because (1) appellants failed to put forward a serious claim that appellees were parties to a knowing concert of action with the state officials, and (2) in any event, the doctrine of legislative immunity insulates appellees from suit. Were only the former involved, we might have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial. But we need not pursue that inquiry since we think the record before the District Court contained unchallenged facts of a nature and scope sufficient to give appellees an immunity against answerability in damages for actions taken in the course of their legislative activities.[7]

The issue, in the large, is whether the actions taken with respect to appellants' records were within the scope of appellees' duties for the Senate Subcommittee. Citing our decision in *Shelton* v. *United States,* 117 U.S.App.D.C. 155, 327 F.2d 601 (1963), appellants argue that the sub- [fol. 111] poenas were invalid because they were issued and executed without the prior authorization of the Subcommittee, as distinct from its Chairman. *Shelton,* however, held only that a person compelled to testify before a Senate Subcommittee by an invalid subpoena could not be convicted of contempt for failing to respond to the Subcommittee's questions. No necessity existed there for consider-

[7] It is settled by *Tenney* v. *Brandhove,* 341 U.S. 367 (1951), that such immunity provides a defense to actions brought for damages under the Civil Rights Act. See also Comment, 40 NOTRE DAME LAW. 70 (1965); Note, 68 HARV. L. REV. 1229 (1955). For general discussions of the Civil Rights Act, see Comment, 49 CALIF. L. REV. 145 (1961), Note, 66 HARV. L. REV. 1285; Comment, 74 YALE L. J. 1462 (1965).

ing the dangers of inhibiting the legislative process by the threat of personal liability to those engaged in it. These are at the core of the public policies reflected in the immunity doctrine.[8]

The Internal Security Subcommittee is required by Senate Resolution to investigate "the extent, nature and effect of subversive activities in the United States . . . ." S.Res. 62, 88th Cong. There is no question that the Senate may legitimately conduct such investigations. As has been said, "The power of Congress to conduct investigations is inherent in the legislative process. That power is broad." *Watkins* v. *United States,* 354 U.S. 178, 187 (1957); see also *Tenney* v. *Brandhove,* 341 U.S. 367, 377-78 (1951). Appellants' own affidavits establish that, for more than a decade, the Subcommittee has evinced an active interest in appellants. As the Subcommittee's Chairman and Chief Counsel, respectively, appellees have immediate responsibilities in the Subcommittee's operations. It is true that the records held by the Louisiana Committee were subpoenaed without prior authorization from the Subcommittee, although the Chairman expressly approved in advance the action proposed to be taken. But this action was shortly brought by appellants to the attention of the Subcommittee as a whole, which discussed the matter of [fol. 112] the subpoenaed papers. After such consideration the Subcommittee, by formal resolution, incorporated the papers in its hearing record, and provided for their ultimate disposition.

Whether this apparently approving action by the full Subcommittee would serve as a *nunc pro tunc* ratification and consequent validation of the subpoena for all purposes, we need not decide. We do regard it as serving to keep appellees' acts in pursuing the Subcommittee's long-

[8] That different considerations are involved when the personal liability of the legislators is involved is illustrated by the facts in *Yellin* v. *United States,* 374 U.S. 109 (1963), which was relied upon in *Shelton.*

standing interest in appellants within the mainstream of legislative effort to a degree adequate to protect against liability in damages for issuing and executing the subpoena. Appellees acted in an area in which the Subcommittee was competent to function. Had appellees received Subcommittee authorization before issuing the subpoena, the official nature of their actions would be evident. Acting first and receiving authorization later does not, under the facts of this case, put their actions beyond the pale of official legislative activity, at least for purposes of the immunity doctrine.[9]

Nor does *Wheeldin* v. *Wheeler,* 373 U.S. 647 (1963), [fol. 113] compel a different result. The plaintiff there sought damages from an investigator for the House Un-American Activities Committee for the allegedly malicious act of serving a subpoena which had been approved by no one, either before or after its issuance. In the Supreme Court the Solicitor General conceded that the complaint on its face showed the defendant to be acting wholly outside the scope of his official duties; and this concession prompted the Court, in the course of otherwise holding that no federal cause of action was made out by the complaint, to note that the immunity doctrine had no relevance. Here, unlike *Wheeldin,* the record before us shows without dispute not only that the subpoena was expressly authorized in the first instance by the Chairman of the legislative

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[9] What appellants essentially contend is that appellees, by acting without prior authorization, acted with a malicious purpose, *i.e.,* to further a conspiracy to deprive appellants of their civil rights. *Tenney* v. *Brandhove,* however, precludes inquiry into appellees' motives to determine the legitimacy of their conduct:

> The claim of an unworthy purpose does not destroy the privilege. . . . The privilege would be of little value if they [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher* v. *Peck,* . . . that it was not consonant with our scheme of government to inquire into the motives of legislators, has remained unquestioned. 341 U.S. at 377.

committee, but also that the full committee ratified the action taken when the matter was promptly brought to its attention. Even if it be assumed that there remained a legal hiatus in the title of the subpoenaing authority, immunity from suit is not thereby destroyed. As was said by the dissenting judge in *Wheeldin*: "The question of authority is, of course, distinct from that of immunity from civil suit. Even an unauthorized act may be within the scope of the immunity, so long as it is within the 'outer perimeter' of the officer's 'line of duty.'" [10] 373 U.S. at 656 n.4. This is, of course, "a matter of defense," but summary [fol. 114] judgment may rest upon such a defense where, as here, its existence is established by facts which are undisputed.

Finally, appellants contend that because they charge appellees to have conspired with various officials under the color of *state* law, appellees can claim no immunity because of their positions with the Senate Subcommittee. It is argued that appellee's positions with that body must be regarded as incidental and irrelevant to the present suit; and that appellees are to be viewed as in the position of any other citizen. This, however, ignores that the conduct

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[10] Judge Learned Hand once put the point in these terms:

> "[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to satisfy a jury of his good faith. . . . [I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

See also *Barr* v. *Mateo*, 360 U.S. 564 (1959); *Cooper* v. *O'Connor*, 69 U.S.App.D.C. 100, 99 F.2d 135, *cert. denied*, 305 U.S. 642 (1938); *Brownfield* v. *Landon*, 113 U.S.App.D.C. 248, 307 F.2d 389, *cert. denied*, 371 U.S. 924 (1962); *Bershad* v. *Wood*, 290 F.2d 714 (9th Cir. 1961).

of which appellants complain (appellees' activities pursuant to the subpoena) could not have been undertaken had appellees had no official legislative positions and responsibilities.[11]

The judgments of the District Court are

Affirmed.

[fol. 115] Washington, *Senior Circuit Judge,* did not participate in this decision.

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[11] Although it has been suggested that the protection of the legislative immunity doctrine does not extend to appellee Sourwine, cf. *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880), what was said in *Barr* v. *Matteo* about the immunity of executive officials seems persuasive here. "The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions . . . ." 360 U.S. at 572-73. See also, *Cooper* v. *O'Connor, supra; Bershad* v. *Wood, supra.*

[fol. 116]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 18,435 and 18,544

JAMES A. DOMBROWSKI, et al., Appellants,

v.

COLONEL THOMAS D. BURBANK, et al., Appellees.

Appeals from the United States District Court
for the District of Columbia

Before: Washington,* Senior Circuit Judge, and Burger and McGowan, Circuit Judges.

JUDGMENT—February 4, 1966

These cases came on to be heard on the records on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

On Consideration Whereof, it is ordered and adjudged by this court that the judgments of the District Court on appeal in these cases are affirmed.

Per Curiam.

Dated: February 4, 1966

[fol. 118] Clerk's Certificate to foregoing transcript (omitted in printing).

[File endorsement omitted]

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* Senior Circuit Judge Washington did not participate in the decision of this case.

[fol. 119]

SUPREME COURT OF THE UNITED STATES

No. 118—October Term, 1966

JAMES A. DOMBROWSKI, et al., Petitioners,

v.

JAMES EASTLAND, etc., et al.

ORDER ALLOWING CERTIORARI—October 10, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration or decision of this petition.

SUPREME COURT, U. S.
MAY 5 1966
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1965

No. ~~1999~~ 118

JAMES A. DOMBROWSKI and
SOUTHERN CONFERENCE EDUCATIONAL
FUND, Inc.,

Petitioners,

against

SENATOR JAMES EASTLAND, individually and as Chairman of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate; J. G. SOURWINE, individually and as Committee counsel for the Internal Security Subcommittee of the Judiciary Committee of the United States Senate,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Supreme Court of the United States

October Term, 1965

No. ————

JAMES A. DOMBROWSKI and SOUTHERN CONFERENCE EDUCATIONAL FUND, INC.,

Petitioners,

against

SENATOR JAMES EASTLAND, individually and as Chairman of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate; J. G. SOURWINE, individually and as Committee counsel for the Internal Security Subcommittee of the Judiciary Committee of the United States Senate,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioners, James A. Dombrowski and Southern Conference Educational Fund, Inc., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the orders of the United States District Court for the District of Columbia, dismissing the cause of action for injunctive relief and granting summary judgment against petitioners in the cause of action for money damages.

Opinions Below

The Court of Appeals affirmed the orders of the District Court in a *per curiam* opinion in which only two Circuit Judges joined. (Circuit Judges Burger and McGowan

joined in the opinion. Senior Circuit Judge Washington did not participate in the decision.) The *per curiam* opinion is not yet reported and is reprinted herein in Appendix A.

The District Court opinion by District Judge Holtzoff, dismissing so much of the complaint as sought injunctive relief, is not yet reported and is reprinted herein as Appendix B. No opinion was filed by District Judge Sirica in granting respondents' motion for summary judgment in the cause of action for money damages.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on February 4, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the concept of legislative immunity embodied in Article I, Section Six of the Constitution totally immunizes a United States Senator and a Senate employee from a law suit for money damages under the Civil Rights Act, where the complaint charges that the Senator and the employee participated in a conspiracy together with officials of the State of Louisiana, under color of unconstitutional state laws, to contrive illegal and false arrests of citizens and illegal raids and seizures of books, records and membership lists of civil rights organizations in violation of the Fourth Amendment, all for the purpose of deterring and frightening these citizens and many others from exercising fundamental rights under the First Amendment in their efforts to enforce the constitutional guarantee of Negro freedom and equality in the Southern states?

2. Whether summary judgment for the defendants should have been granted by the district court in an action

for money damages under the Civil Rights Act where the Court of Appeals concedes that absent considerations of legislative immunity the record reveals material disputed issues of fact relating to the participation of a Senator and a Senate employee in a knowing concert of action with state officials to utilize unconstitutional state laws to contrive illegal arrests and raids and seizures in violation of the Constitution and laws of the United States?

3. Whether the doctrine of legislative immunity embodied in Article I, Section Six of the Constitution protects an employee of the legislature from a law suit for money damages under the Civil Rights Act where the complaint charges and the record shows material disputed issues of fact relating to the employee's participation in a conspiracy together with state officials to utilize unconstitutional state laws to contrive the illegal arrest of citizens and illegal raids and seizures in violation of the Fourth Amendment, for the purpose of deterring and frightening these and other citizens from exercising fundamental constitutional rights in their efforts to enforce the guarantees of racial equality in the Southern states?

4. Whether, if the doctrine of legislative immunity embodied in Article I, Section Six is not available to this employee, the judicially developed doctrine of immunity of government officers developed by this Court in *Barr* v. *Matteo* is applicable to this employee and, if so, should the doctrine of that case be reconsidered by this Court?

5. Whether a complaint states a cause of action for equitable relief under the Civil Rights Acts where an injunction is sought restraining participants in a conspiracy with state officials to utilize state laws to contrive illegal arrests, searches and seizures in violation of the Constitution from using or disposing of the illegally obtained fruits of the unconstitutional raids and seizures?

6. Whether the reinstatement of the cause of action for equitable relief is required to implement and further the purposes of the mandate and decision of this Court in *Dombrowski* v. *Pfister*, 380 US 479?

Statement of the Case

The serious and substantial questions raised in this petition arise out of the factual context of the illegal arrests and raids under the color of unconstitutional Louisiana state statutes, already considered by this Court in *Dombrowski* v. *Pfister*, 380 US 479 (1965).

A—Statement of Facts

1. The Facts Preceding the Institution of the Present Action for Injunctive Relief and Money Damages

Petitioner Southern Conference Educational Fund, Inc., hereafter referred to as "SCEF", is a non-profit membership corporation organized under the laws of the State of Tennessee and maintains an office in the State of Louisiana (1a).[1] The purpose and function of SCEF as an association is to attempt to secure to Negro citizens the rights guaranteed to them under the federal Constitution and to participate in efforts to end all forms of segregation in the Southern states (1a). See *Dombrowski* v. *Pfister*, at p. 482. Petitioner, Dr. James A. Dombrowski, was then the Executive Director of SCEF and was a citizen of the State of Louisiana and the United States (1a, 20a). Both SCEF and Dr. Dombrowski were successful appellants in *Dombrowski* v. *Pfister, supra.*

Respondent Eastland is the senior Senator from the State of Mississippi and respondent Sourwine is the Chief

[1] All references are to the printed joint appendix in the Court of Appeals.

counsel of the Internal Security Subcommittee of the Senate.

Sometime in the summer of 1963, private discussions were held between respondent Sourwine and one Jack N. Rogers, counsel to the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature concerning the records, lists and files of SCEF (50a, 51a).

On the afternoon of October 4, 1963, certain police officers of the Police Department of the City of New Orleans, Louisiana, together with officers of the Louisiana State Police and representatives of the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, broke into and forcibly entered the office of SCEF in the City of New Orleans and proceeded to seize the entire contents of the office including the books and records of the organization, its ledgers, receipts, memoranda, membership lists, lists of contributors, vouchers, pamphlets and literature, together with many items of personal property belonging to Dr. Dombrowski. The office was totally ransacked and everything movable taken out (3a, 20a through 25a). Dr. Dombrowski was placed under arrest and booked for violation of Louisiana Revised Statutes 14:358 et seq. and 14:390 et seq., known as the Louisiana Anti-Subversive Laws (19a).[2] The same day officers of the New Orleans Police Department of the State Police, together with representatives of the Louisiana Joint Legislative Committee, proceeded to search the residence of Dr. Dombrowski in the City of New Orleans and seized many items of personal property from his house and from his automobile located nearby (21a). The circumstances of the arrests and raids were detailed by this Court in the

[2] The provisions of the Louisiana law under which Dr. Dombrowski was arrested were later stricken as facially unconstitutional by this Court in *Dombrowski* v. *Pfister, supra.*

Dombrowski opinion. See footnote four, 380 US at 479, 480.[3]

The raids of October 4 and the arrest of Dr. Dombrowski were conducted purportedly under the authority of search warrants and arrest warrants issued on October 2nd by a Judge of the Criminal District Court of the Parish of Orleans. However, at a preliminary hearing, a Judge of the Criminal District Court for the Parish of Orleans, after taking evidence, summarily discharged the defendants. The state judge held that the arrest warrants were improvidently issued and that there was no reasonable cause for the arrests (19a). See dissenting opinion of Circuit Judge Wisdom in *Dombrowski* v. *Pfister*, 227 F. Supp., at 573. Moreover at a later stage in the state proceedings the state court granted a motion to suppress the seized evidence on the ground that the raids were illegal in violation of the Federal Constitution relying upon this

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[3] The text of the Court's footnote is as follows:

"The circumstances of the arrests are set forth in Judge Wisdom's dissenting opinion:

'At gunpoint their homes and offices were raided and ransacked by police officers and trustees from the House of Detention acting under the direct supervision of the staff director and the counsel for the State Un-American Activities Committee. The home and office of the director of Southern Conference Educational Fund were also raided. Among the dangerous articles removed was Thoreau's *Journal*. A truckload of files, membership lists, subscription lists to SCEF's newspaper, correspondence, and records were removed from SCEF's office, destroying its capacity to function. At the time of the arrests, Mr. Pfister, Chairman of the Committee, announced to the press that the raids and arrest resulted from "racial agitation."' 227 F. Supp., at 573."

Court's decision in *Mapp* v. *Ohio*, 367 US 643.[4] (The opinion of the state court granting the motion to suppress is set forth in Appendix C.) Consequently, under rulings of the Louisiana state courts both the arrests and raids were wholly illegal. As this Court pointed out in *Dombrowski*, "Later in October a state judge quashed the arrest warrants as not based on probable cause, and discharged the appellants. Subsequently, the court granted a motion to suppress the seized evidence on the ground that the raid was illegal." 380 US at p. 488.

The illegality of the raids was further underscored by the decision of this Court in *Dombrowski* directing that on remand the decree of the three-judge court shall include an order directing the "immediate return of all papers and documents seized." 380 US at p. 497.

However, despite the ruling of the state court in October that the arrest warrants were illegal and issued without probable cause, the books, records, documents, memberships lists and other articles which had been seized during the raids were not returned to the petitioners but were, secretly and without petitioners' knowledge, transferred to the possession of the respondents Sourwine and Eastland. Apparently, sometime prior to the raids discussions had been held between Rogers, the counsel to the Louisiana Joint Committee, and respondent Sourwine, during which the question of the records and files of SCEF was discussed. The uncontested record facts next show that sometime in the evening of the raids, October 4th, Rogers telephoned Sourwine informing him that the Louisiana Committee had obtained all the records, files, membership lists and other materials belonging to SCEF (53a). Respondent

[4] The motion to suppress was made after indictments were returned following the dissolution of Judge Wisdom's temporary restraining order by the majority of the three-judge court. See 380 US at 484. The state court opinion was rendered subsequent to oral argument before the Court of Appeals in the present case.

Sourwine then appeared in Baton Rouge, Louisiana, the next morning (54a). He had in his possession blank subpoenas signed by respondent Eastland.[5] These subpoenas, according to respondent Sourwine's testimony, were served on Rogers that morning, although the subpoenas on their face were dated October 4th, the day of the raids (35a, 36a). Respondent Sourwine maintained this was a "stenographic error" (35a, 36a). The Superintendent of the Louisiana Police was "appointed" on the same day "custodian" of these records and documents by respondent Sourwine (37a). However, the physical location of the records and other material remained in Baton Rouge physically under the control of the state officials (37a). Respondent Sourwine later testified that the issuance of the blank subpoenas dated October 4th, was never authorized by the Internal Security Subcommittee of the Senate, and that these subpoenas were not specifically authorized by the Committee or the Subcommittee (35a, 36a).

These relations between respondent Sourwine and the Louisiana officials on the evening of the raids and the next day were unknown to the petitioners until the day of the preliminary hearing on October 25th when the Louisiana officials informed the state court that they could not comply with any order to return the documents and membership lists seized during the illegal arrests since they were technically in the custody of the respondents Sourwine and Eastland although physically still in the possession of state officials. Until that moment respondents' participation in the events of October 4th and 5th was completely unknown to petitioners or to the press or public.

Immediately after the ruling of the state court on October 25th voiding the warrants of arrest under the disclosure of respondents' role in the seizure of the docu-

[5] The record reveals that respondent Sourwine had access to a "folder which contains a number of subpoenas signed by the Senator in blank" (36a).

ments, petitioners instituted in the United States District Court for the Eastern District of Louisiana, New Orleans Division, a federal plenary action under the Civil Rights Act and the Constitution, seeking injunctive relief and money damages. The action is referred to hereafter as the first action.[6]

Petitioners joined, as defendants in the first action, the Louisiana state officials involved in the raids together with respondent Eastland charging a conspiracy under the color of Louisiana state law to deprive the appellants of rights, privileges and immunities granted to them as citizens of the United States by the laws and Constitution of the United States (7a). The complaint was filed on Sunday morning, October 27th. A motion for a temporary restraining order restraining the defendants from removing any of the seized documents, records and other articles from their location in Baton Rouge, and from delivering them, or surrendering them in any way to respondent Eastland, was immediately presented to Federal District Judge Ainsworth of the Eastern District of Louisiana (29a). Judge Ainsworth was assured by representatives of the State that the seized material was then still at the State Police Headquarters in Baton Rouge. Judge Ainsworth thereupon directed that the motion be returnable before him Monday morning, October 28th, in New Orleans and ordered petitioners to notify the defendants in the action that the restraining order would be heard in the District Court that Monday morning (29a). The appellants notified respondent Eastland by telegram (29a).[7]

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[6] This action was entitled *Dombrowski* v. *Burbank*, #13,967, in the Eastern District of Louisiana, New Orleans Division.

[7] The telegram read as follows: "Federal Judge Robert Ainsworth has requested your presence in his office 9:30 AM, October 28th, to discuss an injunction enjoining turning over SCEF and Smith and Waltzer records to Senator Eastland" (59a).

The uncontested record facts are that on Sunday evening, October 28th, respondent Eastland notified respondent Sourwine by telephone of the receipt of this telegram and directed respondent Sourwine to telephone Baton Rouge at once and arrange to have all of the records, documents, membership lists and other materials transferred that night out of the State of Louisiana (60a). At about midnight, Sunday night, a vanload of material containing these records and documents was moved over the Louisiana state border to Woodville, Mississippi, through arrangements made by respondent Sourwine (29a) and was deposited with the clerk of the Chancery Court in Woodville (29a). On Monday morning, October 28th, attorneys for the Louisiana state officials informed the Federal District Judge that the records and material seized in the raid, the subject of the temporary restraining order, were no longer in the jurisdiction of the Federal District Court for the Eastern District of Louisiana and that the matter was therefore moot (29a).

Immediately thereafter petitioners filed the present complaint in the United States District Court for the District of Columbia, the residence of respondents Sourwine and Eastland.

2. The Initiation of the Present Complaint

The present complaint (1a-11a) paralleled almost identically the basic allegations of the complaint filed on October 27th in the Eastern District of Louisiana in the first action. The present complaint alleged that the defendants Thomas D. Burbank, Russell R. Willie, James H. Pfister, all state officials, and respondents Eastland and Sourwine, entered into a plan, agreement and conspiracy, under the color of Louisiana state laws and statutes, to deprive the petitioners of rights, privileges and immunities granted to them as citizens of the United States under the laws and Constitution of the United States. The complaint alleged

that pursuant to this conspiracy the defendants, under the color of certain Louisiana state statutes, planned and carried through raids of the petitioners' homes and offices, as well as causing the arrest of petitioner Dombrowski, in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States.

The complaint further alleged that the defendants conspired, under the color of the Louisiana state statutes, to seize books, records, lists of members, contributors and friends of petitioner SCEF who were engaged in efforts throughout the states of the South to implement the Equal Protection Clause of the Fourteenth Amendment. The complaint further alleged that these activities of the defendants was for the purpose of harassing, intimidating and deterring the petitioners, their friends, members and supporters from exercising federally-protected constitutional rights. The complaint further alleged that the illegal actions of the defendants, under color of the Louisiana state statutes, has resulted in serious damage to the plaintiffs.

The complaint further alleged that one of the central purposes of the conspiracy was to obtain possession of the membership lists of the petitioner SCEF, a civil rights organization. Since the decision of this Court in *NAACP* v. *Alabama*, 357 US 449, it has become increasingly clear that the enforced production of membership lists of organizations actively seeking enforcement of the Equal Protection Clause in the Southern states itself violates the Constitution, 357 US, at p. 462; see also *NAACP* v *Flowers*, 377 US 288; *Louisiana* v. *NAACP*, 366 US 293. The complaint charged that the respondents, together with the Louisiana state officials, sought to utilize the Louisiana laws as a pretext for the obtaining of the membership lists through raids and seizures, which they could not have otherwise obtained through lawful legislative process.

The complaint sought money damages in the amount of $250,000 for each plaintiff as well as appropriate injunctive relief.

B—Proceedings Below

1. Proceedings in the District Court

After the filing, and serving of the complaint upon those defendants who were Washington, D. C., residents, respondents Eastland and Sourwine,[8] a motion for a preliminary injunction came before the District Court for the District of Columbia on December 18th, 1963. Although petitioners sought to withdraw the motion in order to take a deposition of respondents in support of the request, the District Court, by Judge Holtzoff, entered an order from the bench dismissing so much of petitioners' complaint as sought injunctive relief against the defendants (12a-14a). Judge Holtzoff delivered an oral opinion in support of his conclusions that the granting of injunctive relief would "contravene the constitutional requirement of separation of powers and would exceed the jurisdiction of this Court" (Appendix B). Notice of appeal was duly filed from this order. The order of Judge Holtzoff left undisturbed so much of the complaint as set forth a cause of action for money damages against respondents.

Pursuant to the Federal Rules of Civil Procedure a deposition of respondent Sourwine was taken by petitioners. Subsequent to this, a deposition of Walter Dillon, Esq., one of the attorneys for the petitioners, was taken by the respondents. Both of these depositions are part of the files of the case. A portion of the deposition of respondent Sourwine is printed as part of the Joint Appendix in the Court below (36a, 37a). Immediately subsequent

[8] Service was never effected in this action upon the Louisiana defendants. Similarly, service was not effected upon Eastland, as a defendant in the first action.

to the taking of these depositions, respondents moved to dismiss the complaint or, in the alternative for summary judgment (15a). Identical motions were made in the first action in the Federal District Court in Louisiana by the Louisiana state defendants. Affidavits were filed in both actions in support of the motion and in opposition.[9]

On March 12, 1964, the District of Columbia District Court, by Judge Sirica, granted the motion for summary judgment in respect to the cause of action for damages (17a). No opinion was filed. A notice of appeal was duly filed from the order granting summary judgment (17a). A subsequent order of the Court of Appeals consolidated the appeals from the first order dismissing the complaint insofar as it prayed for injunctive relief and the second order granting summary judgment on the cause of action for damages.

2. Proceedings in the Court of Appeals for the District of Columbia

The Court of Appeals in a *per curiam* opinion, in which Senior Circuit Judge Washington did not participate, affirmed the orders of the District Court. In respect to the dismissal of the request for injunctive relief the Court held that the relief sought was properly denied on the limited ground that an equitable decree against respondents Eastland and Sourwine restraining their use of the illegally

[9] Subsequent to the filing of these affidavits but prior to the hearing on respondents' motion, petitioners filed affidavits of counsel seeking to invoke Rule 56, Subdivision (f) of the Federal Rules of Civil Procedure, which would permit the Court on a motion for summary judgment to grant a continuance "to permit affidavits to be obtained or depositions to be taken or discovery to be had" (30a-35a). These affidavits of counsel set forth certain questions of fact which were discovered after respondents' motion, which indicated the existence of additional serious and sharply disputed material issue of facts which would have required the denial of a motion for summary judgment.

seized material and requiring its return would not be effective since the materials were then in the possession of the Subcommittee itself.

In respect to the cause of action for money damages, the respondents had urged two positions in the Court of Appeals: (1) that petitioners failed to put forward a serious claim that respondents were parties to a knowing concert of action with the state officials, and (2) in any event the doctrine of legislative immunity insulated both respondents from suit. See opinion of court, Appendix A. The Court of Appeals, rejecting the first contention, pointed out that "were only the former involved we might have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial." However, the Court of Appeals based its affirmance solely upon an assumption that the doctrine of legislative immunity wholly insulates the respondents from this damage action, resting upon this Court's decisions in *Tenney* v. *Brandhove,* 341 US 367 (1951); *Barr* v. *Matteo,* 360 US 564 (1959); and *Wheeldin* v. *Wheeler,* 373 US 647 (1963).

3. Proceedings in the First Action in the Eastern District of Louisiana and the Court of Appeals for the Fifth Circuit

Simultaneous with the motion made in this action in the district court, the Louisiana state officials, defendants in the first action, made identical motions on identical grounds, before District Judge Ainsworth in the Eastern District of Louisiana. On March 18, 1964, Judge Ainsworth denied the motion of James Pfister, a member of the Louisiana legislature, and the Chairman of the Joint Legislative Committee for summary judgment in the cause of action for money damages. Pfister had urged, in identical terms as respondents here, that he was entitled to absolute legislative immunity under the doctrine of this Court in *Tenney* v. *Brandhove, supra.* Judge Ainsworth denied the

motion holding that "there is a sharp dispute as to the facts upon which we can conclude whether or not the defendant was engaged in permissible legislative activity on the dates he is alleged to have committed tortious acts against plaintiff". (This opinion is set forth in Appendix D.) Judge Ainsworth concluded that on the facts of this case, the opinion of the Court in *Tenney* did not require summary dismissal of the cause of action for money damages.[10]

In March, 1965, Chairman Pfister renewed his motions for summary judgment or for dismissal, and moved in the alternative for an order as authorized by 28 USC 1292(b) to appeal the District Court's denial of his motions to the Court of Appeals. On March 18, 1965, Judge Ainsworth, in a careful opinion, reaffirmed his refusal to grant the motions. The opinion, reproduced here as Appendix E, restates the conclusion of the District Court that the illegal acts charged against Chairman Pfister do not receive an automatic blanket immunity under this Court's decision in *Tenney*, and that the issue of whether these illegal acts are in fact within any protected orbit of legislative activity must be tried in court. However, in the interest of "judicial economy" Judge Ainsworth granted an order for an interlocutory appeal under 28 USC 1292(b) from his refusal to grant the motions for summary judgment in the money damages cause of action. The Court of Appeals for the Fifth Circuit thereafter dismissed Chairman Pfister's appeal. *Pfister* v. *Dombrowski*, Misc. #168, 1965, Court of Appeals for the Fifth Circuit (denying leave to take the interlocutory appeal). As a result, the cause of action for money damages in the first action against Chair-

[10] In a companion opinion on the same day a similar motion for summary judgment made by another state official, Major Willie, was denied by Judge Ainsworth. A motion by the Superintendent of State Police Burbank for summary judgment was granted, not on immunity grounds, but for failure to present a sufficient case of connection with the conspiracy.

man Pfister and the other Louisiana officials will be tried in the Federal District Court for the Eastern District of Louisiana and is presently on the trial calendar.[11]

Accordingly the decisions of the Fifth Circuit and the Court of Appeals for the District of Columbia are in sharp conflict as to the applicability of the doctrine of legislative immunity to civil rights damage actions arising out of the context of events previously considered by this Court in *Dombrowski* v. *Pfister*. This conflict between the Circuits arises in great measure out of a difference in interpretation of the controlling decisions of this Court.

Reasons for Granting the Writ

This petition raises serious and substantial questions arising once again out of the factual complex which was the occasion of the Court's examination in *Dombrowski* v. *Pfister*, in the October 1964 Term, 380 US 479. And once again, as in the original case, questions arising out of petitioners' efforts to seek redress in the national courts for injury to their fundamental rights touch on issues of importance not only to the enforcement of laws protecting civil rights but to the very essentials of a judicial system constructed upon the premise that this is a government of law and not men.

1. The opinion of the Court of Appeals rests upon an extension of the doctrine of legislative immunity which is at war with the applicable decisions of this Court and with the first principles of a government predicated upon the assumption that no man no matter how high his position

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[11] Chairman Pfister also attempted to implead the other members of his Legislative Committee as third-party defendants. Judge Ainsworth dismissed Chairman Pfister's third-party complaint, and this dismissal is presently on appeal to the Fifth Circuit. *Pfister defendant, 3rd Party Plaintiff* v. *Arcenequx, 3rd Party Defendant*, #22,562, Court of Appeals for the Fifth Circuit.

stands wholly above the law. Cf. *Marbury* v. *Madison*, 1 Cranch 137, 163-168.

The lower court does not question the jurisdiction of the District Court to entertain the cause of action for money damages either under the Constitution, cf. *Bell* v. *Hood*, 327 US 678; *Wheeldin* v. *Wheeler*, 373 US 647; *Bock* v. *Perkins*, 139 US 628, or under Title 42 USC 1983 and 1985; *Monroe* v. *Pape*, 365 US 171; *Lee* v. *Hodges*, 321 F. 2d 480 (CA4, 1963); *Nesmith* v. *Alford*, 318 F. 2d 110 (LA 5, 1963); *Hughes* v. *Johnson*, 305 F. 2d 67 (CA9, 1962); *Cohen* v. *Norris*, 300 F. 2d 24 (CA9, 1962); *Basista* v. *Weir*, 340 F. 2d 74 (CA3, 1965); *Beauregard* v. *Wingard*, 230 F. Supp. 167 (D.C.S.D. Cal. 1964); *Bargainer* v. *Michal*, 233 F. Supp. 270 (D.C.N.D. Ohio, 1964). Nor does the lower court voice any hesitation as to whether the complaint adequately states a cause of action for money damages under the Civil Rights Act, cf. *Monroe* v. *Pape; Nesmith* v. *Alford; Lee* v. *Hodges; Hughes* v. *Johnson; Cohen* v. *Norris; Basista* v. *Weir; Beauregard* v. *Wingard; Bargainer* v. *Michal*, all *supra*. Cf. *Dombrowski* v. *Pfister*, *supra*, at p. 490.[12] Neither does the lower court seriously entertain any doubts as to the presence in the record of material disputed issues of fact as to respondents' participation in a knowing concert of action with the state officials requiring resolution by means of a trial. See opinion below, Appendix A.

Nevertheless, despite clear federal jurisdiction, an adequately pleaded cause of action, and genuine issues of fact in the record as to respondents' participation in a conspiracy under color of Louisiana state law to deprive petition-

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[12] It is significant in this respect that this Court specifically held in the first *Dombrowski* opinion that the allegations of that complaint "state a claim under the Civil Rights Act, 42 USC 1983" citing *Beauregard* v. *Wingard*, and *Bargainer* v. *Michal*, *supra*. The allegations of the present complaint for money damages under 1983 are, of course, identical in substance to the *Dombrowski* v. *Pfister* complaint, arising out of the same factual situation. See Statement of Facts, *supra*.

ers of federally protected rights, the lower court casts a mantle of total immunity over these respondents from any actions for damages under the Civil Rights Act. This stretches the immunity doctrine to unrecognizable contours and transforms a concept historically fashioned as a shield to protect the freedom of speech of legislators from the oppressive tyranny of an overbearing executive, cf. *United States* v. *Johnson*, #25, October Term, 1965, US , 86 S. Ct. 749 (1966), into a privileged sanctuary for men in high places to participate in and carry through activities in flagrant violation of the Constitution they are sworn to uphold. Such a distortion of the legislative immunity doctrine finds no support in the decisions of this Court from *Marbury* v. *Madison to United States* v. *Johnson* in the present Term.

2. The lower court reads the decisions of this Court as requiring the imposing of the shield of legislative immunity wherever a defendant utilizes his position as a legislator to further his violation of law. Thus the lower court brushes aside the allegations and evidence tending to show that the respondents had participated in a conspiracy with state officials to utilize state law to contrive false arrests and to engineer illegal raids by arguing that "this . . . ignores that the conduct of which appellants complain could not have been undertaken had appellees had no official legislative positions and responsibilities" Appendix A. But, this is the heart of the problem. A doctrine which immunizes the illegal acts of a legislator merely because the legislator uses his official position to accomplish the violation of law would sanction a governmental tyranny wholly destructive of the liberties of citizens. No greater danger to a free society exists than the concept that men in high places are immune to the prohibitions of the law merely because they hold these high positions. A policeman who beats a citizen or who seizes his property without a warrant is not immune from legal recourse by the citizen because the policeman wears his uniform and carries his

badge while he beats his victim or seizes his possessions. Cf. *Monroe* v. *Pape, supra.* Similarly a legislator who takes part in a conspiracy to carry out an illegal search and seizure in violation of the Fourth Amendment is not immune from a legal response merely because he takes advantage of his official position to further the illegal conspiracy. Cf. *United States* v. *Johnson, supra.*

This Court has carefully emphasized that the test of the appropriateness of legislative immunity is not the official status of the legislator but the nature of the acts he is called to account for. The lower court reads this Court's decision in *Tenney* v. *Brandhove,* 341 US 367 (1951), as a sanction for the broad cloak of immunity it cast over respondents' charged illegal activities. But *Tenney* rejected the limitless concept of legislative immunity the lower court invokes. Mr. Justice Frankfurter carefully pointed out that the doctrine is properly called into play only where "it appears that the defendants were acting in the sphere of legitimate legislative activity." *Tenney* v. *Brandhove,* at p. 376. Any legislative immunity, Justice Frankfurter insisted in *Tenney,* extends only to conduct within "the sphere of legitimate legislative activity." And Justice Frankfurter further reiterated that "this Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role." *Tenney* v. *Brandhove,* at p. 377. In applying this definition of legislative immunity to the facts before the Court in Tenney, Justice Frankfurter carefully confined the holding of the majority:

> "We conclude only that here the individual defendants and the Legislative Committee were acting in a field where legislators traditionally have power to act, and that the statute of 1871 does not create civil liability for such conduct." [*Tenney* v. *Brandhove,* at p. 379]

The concurring opinion of Mr. Justice Black, sharpened the definition of legislative immunity presented in the *Ten-*

ney majority opinion. Mr. Justice Black emphasized the outer boundaries of the doctrine:

> "The Court holds that the Civil Rights statutes were not intended to make legislators personally liable for damages to a witness injured by a committee exercising legislative power. This result is reached by reference to the long-standing and wise tradition that legislators are immune from legal responsibility for their intra-legislative statements and activities. The Court's opinion also points out that Kilbourn v. Thompson, 103 US 168, 28 L. Ed. 377, held legislative immunity to have some limits. And today's decision indicates that there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally liable in a suit brought under the Civil Rights Act. I substantially agree with the Court's reasoning and its conclusion."

The action of the lower court in immunizing the illegal conduct of respondents Eastland and Sourwine is in complete conflict with the principles delineated in both the *Tenney* majority and concurring opinions. The acts charged in the complaint, the conspiracy to utilize unconstitutional state laws to arrest petitioners without cause, to raid their offices and homes and seize their property in violation of the Fourth Amendment, all for the purpose of intimidating and deterring them and other citizens from exercising fundamental rights in order to achieve racial equality is hardly "legitimate legislative activity" on the part of legislators or their employees. Cf. *Tenney* at p. 376. Nor is a conspiracy to violate the federal rights of citizens "a field where legislators traditionally have power to act." Cf. *Tenney* at p. 379.

As Mr. Justice Black warned in his concurring opinion, the *Tenney* decision "indicates that there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally liable in

a suit brought under the Civil Rights Act." This petition presents such a point. It is difficult to imagine any conduct which could more exceed "the bounds of legislative power." If *Tenney* could be read to immunize such conduct then the reservations of Mr. Justice Douglas in the dissenting opinion as to the majority formulations ought to be reconsidered and the entire doctrine reevaluated.

3. Only this Term this Court has warned against a distortion of the legislative immunity doctrine which would blur the distinction between legislative activity legitimately protected by the Speech or Debate Clause and unlawful conduct for which a legislator remains accountable in law. In *United States* v. *Johnson, supra,* the Court in reversing the conviction of a Congressman for violation of the conflict of interest statute and conspiracy to defraud the United States carefully pointed out that while reliance upon a speech made by the defendant on the floor of the House in the trial of the conspiracy count violated Article I, Section 6,[13] only the speech was immunized and not the charged unlawful conduct. Thus, Mr. Justice Harlan warned for the Court:

> "No argument is made, nor do we think that it could be successfully contended, the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process." 86 S. Ct. at 751.[14]

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[13] "For any Speech or Debate in either House, they shall not be questioned in any other place."

[14] It is revealing in this respect that the Court in *Johnson* did not dismiss the indictments against the Congressman but remanded for new trials on both the conspiracy and substantive counts purged of reliance upon the speech delivered on the floor of the House. The Chief Justice and Justices Douglas and Brennan would have affirmed the substantive counts for violation of the conflict of interest statute without remanding these counts for a new trial.

The teaching of *United States* v. *Johnson* is directly applicable here. The Speech or Debate Clause does not reach conduct such as was involved in the conspiracy to utilize the overbroad anti-subversive laws of Louisiana to obtain the illegal arrest of the petitioner and provide a pretext for raids and seizures violative of the Fourth Amendment. This is conduct no less heinous than an "attempt to influence the Department of Justice" and no less prohibited by applicable federal statutes.[15] And as in *Johnson* it is conduct "that is in no wise related to the due functioning of the legislative process." 86 S. Ct. at p. 751. The decision of the lower court is in sharp conflict with this Court's recent decision in Johnson and ought to be reviewed and reversed.

4. In *Johnson* the Court had the occasion to probe the historical roots of the Speech or Debate Clause. As Mr. Justice Harlan carefully points out:

> "There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause." 86 S. Ct. at 755-6.

The matrix out of which the American legislative privilege was fashioned was the determination to protect the absolute freedom of speech of representatives of the people from "intimidation by the executive and accountability before a possibly hostile judiciary." 86 S. Ct. at 755. Thus in *Kilbourn* v. *Thompson*, 103 US 168, the first discussion in this Court of the dimensions of the legislative privilege, the Court, mindful of this purpose, read the Clause broadly to include not only "words spoken in debate," but any-

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[15] Cf. 18 USC 241, 242. See *United States* v. *Price*, US , 86 S. Ct. 1152; *United States* v. *Guest*, US , 86 S. Ct. 1170 (1966).

thing "generally done in a session of the House by one of its members in relation to the business before it," 103 US at p. 204. But it would be ironic indeed if a privilege of immunity designed to protect the free speech of legislators were to be turned into an instrument for the destruction of the free speech of citizens. Yet this will be the inevitable result unless a tendency of inferior federal courts reflected in the decision below to read the opinions of this Court as sanctioning a limitless immunity is not checked.

The underlying constitutional concern with "the central importance to our political system of uninhibited political expression as guaranteed to the general populace by the First and Fourteenth Amendments," *United States* v. *Johnson, supra,* footnote 12, has at least as important a place in the constitutional spectrum as the insistence upon the "independence and integrity of the legislature." *United States* v. *Johnson, supra.* Indeed the Court in *Johnson* recognizes that these two objectives are deeply interrelated. See Footnote 12. This case presents to the Court the necessity for accommodating one fundamental constitutional value—"the central importance . . . of uninhibited political expression [by] the general populace" with another fundamental constitutional value—"the independence and integrity of the legislature." This adjustment of separate but interrelated values can be accomplished through a repudiation of the formless and automatic immunity concept applied by the lower court and an insistence that the limitations upon the doctrine, implicit in *Kilbourn* and made explicit in *Tenney,* will be rigorously enforced, particularly where the illegal activities of the legislator trenches upon the rights of citizens to "uninhibited political expression." *United States* v. *Johnson, supra.*

When Mr. Justice Miller first discussed the Speech or Debate Clause in this Court in *Kilbourn* he found it important to state the limitations upon the privilege being then

enunciated which the Court might one day have to face. Thus in sustaining the privilege as to a resolution offered on the floor of the House he pointedly stated: "It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible." Again in *Tenney*, in joining the majority, Mr. Justice Black warned of a point at which a legislator's conduct "so far exceeds the bounds of legislative power that he may be held personally liable in a suit brought under the Civil Rights Act."

When a legislator conspires with officials of a state to utilize state laws to harass citizens with false arrests and illegal raids and seizures in order to frighten and deter these citizens from exercising the rights of speech, press and assembly in their efforts to implement the constitutional promise of racial equality, the moment Mr. Justice Miller warned of in *Kilbourn* has come. This is conduct "of an extraordinary character for which the members who take part in the act may be held legally responsible." A proper deference to the paramount constitutional objective of "uninhibited political expression as guaranteed to the general populace," *United States* v. *Johnson*, *supra*, requires that the limitations to the legislative immunity doctrine reiterated by the Court from *Kilbourn* to *Johnson* be rigorously enforced particularly where, as here, in violation of federal law, the acts of the legislator in question interfere with and deter that "uninhibited political expression" "of certain importance to our political system." *United States* v. *Johnson*, (opinion of Mr. Justice Harlan).

5. The opinion of the lower court is in sharp conflict with the recent decision of this Court in *Wheeldin* v. *Wheeler*, 373 US 656 (1963). *Wheeldin* involved an action for damages for injuries caused to the petitioner by the service of a subpoena upon him by the respondent, an investigator for the House Committee on Un-American Activ-

ities. The complaint alleged that the subpoena was signed in blank by the Chairman of the Committee and was unauthorized by the full Committee. The Court of Appeals for the Ninth Circuit invoked the immunity doctrine and dismissed the damage cause of action, 302 F. 2d 36, relying upon this Court's decision in *Barr* v. *Matteo*, 360 US 564.

In this Court both the majority opinion of Mr. Justice Douglas, 373 US 647, and the dissenting opinion of Mr. Justice Brennan, joined in by the Chief Justice, and Mr. Justice Black, 373 US at p. 653, reject any reliance upon an immunity concept in respect to the *Wheeldin* cause of action for damages.

Mr. Justice Douglas, for the majority, disposes of the immunity claim summarily by recording the fact that before the Court "the Solicitor-General has conceded, under the allegations respondent Wheeler was not acting sufficiently within the scope of his authority to bring the doctrine into play." 373 US at p. 647.

And the dissenting Justices likewise brush aside the blanket invocation of immunity with this analysis of the lower court's opinion:

> "It sustained the District Court's dismissal on the sole ground that the allegedly unlawful acts had been committed by respondent in the line of his duty as a federal officer, and that therefore he was immune from suit by reason of the principles announced in *Barr* v. *Matteo*, 360 U. S. 564. In this Court, the Solicitor General of the United States, appearing as counsel for the respondent, candidly admits that the Court of Appeals misapplied *Barr* v. *Matteo*. In that case we upheld the governmental-officer immunity in respect of 'action . . . taken . . . within the outer perimeter of petitioner's line of duty.' 360 U.S., at 575. It has never been suggested that the immunity reaches beyond that perimeter, so as to shield a federal officer acting wholly on his own. A federal officer remains liable for acts committed 'manifestly or palpably beyond his authority.' *Spalding* v. *Vilas*, 161 U.S. 483, 498; see *Colpoys* v. *Gates*, 73 App. D.C. 193, 118 F. 2d 16;

Kozlowski v. *Ferrara*, 117 F. Supp. 650; Note, Remedies Against the United States and Its Officials, 70 Harv. L. Rev. 827, 835 (1957). Liberally construed, see *Virgin Islands Corp.* v. *W. A. Taylor & Co.*, 202 F. 2d 61; 2 Moore, Federal Practice (2d ed. 1948), ¶12.08, at 2245, petitioner Dawson's complaint alleges no less."

The concession of the Solicitor General in *Wheeldin* that the respondent there was not "acting sufficiently within the scope of his authority to bring the [immunity] doctrine into play" applies with particular force to the present petition. Here, as in *Wheeldin*, the only conceivable colorable authority for respondents' participation in the illegal acts charged was the utilization on October 4th and 5th, 1963, of subpoenas purportedly issued on the authority of a Congressional Committee. See Statement of Facts, *supra*. But here, exactly as in *Wheeldin*, the subpoenas were signed in blank by the Chairman; compare 373 US at p. 648 with Statement of Facts, *supra*, at p. 8, and were filled out by the subordinate official; compare 373 US at p. 648 with Statement of Facts, *supra*, at p. 8, and were issued without the authorization or knowledge of the Congressional Committee involved;[16] compare 373

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[16] While the respondents sought to "cure" the obvious lack of authorization for the subpoenas by a subsequent resolution on November 14, 1963 "receiving" the seized material and providing for its photostating and inclusion in the "permanent records" of the Subcommittee, see opinion below, Appendix A, at p. 3a, considerable additional serious doubt was cast upon the existence of any Subcommittee authorization for the actions of the respondents by a letter from Senator Kenneth B. Keating, a member of the Subcommittee, to respondent Eastland. The letter read as follows:

January 30, 1964

Honorable James O. Eastland
Chairman
Senate Judiciary Committee
Washington 23, D. C.

Dear Mr. Chairman:

I understand that the records of the Southern Conference Educational Fund, Inc., were subpoenaed October 5 at your direction.

US at p. 648, with Statement of Facts, *supra*, at p. 8. If respondent Wheeler was not "acting sufficiently within the

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I understand further that they were transferred to Mississippi October 27, two days after a request by officials of the SCEF in the Louisiana Criminal District Court for a permanent injunction to bar removal of these records from the area.

I further understand that on November 14 some members of the Internal Security Subcommittee approved a resolution to incorporate portions of this material by reference into the hearing record and to photostat it in full before returning it. That resolution was not brought to my attention until my staff specifically inquired January 27.

I would therefore like to take this occasion to express my deep concern over the action taken. First, I question what federal legislative purpose is served by the subpoenaing of material already under review by a committee of a state legislature. Secondly, I am very much opposed to the subpoena of any records that are material to pending litigation in a state court. This strikes me as a startling violation of states' as well as individual rights.

Thirdly, I am disturbed that, although a member of the subcommittee which has, in effect, ratified this action, I was not informed of this action or given any opportunity to express my dissent.

Regardless of the nature of the group involved in this case, I believe the action taken by the subcommittee is most unfortunate and I strongly urge that no further actions be undertaken by the committee along these or similar lines without full discussion by the entire subcommittee.

Very sincerely yours,

KENNETH B. KEATING

(Exhibit A to affidavit of counsel in opposition to motion for summary judgment) (32a, 33a).

On the basis of this letter petitioners moved pursuant to Rule 56, subdivision (f) of the Federal Rules of Civil Procedure for "a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had." This motion was denied by the District Court.

scope of his authority to bring the doctrine into play" neither were the respondents here.[17]

But *Wheeldin* applies with even greater force to this cause of action for damages under the Civil Rights Act. The majority opinion, after disposing of the immunity question, and asserting the existence of federal jurisdiction, 373 US at p. 649, found that the "facts alleged do not establish a violation of the Fourth Amendment", 373 US at p. 650. Absent other considerations not here germane [18] it is perfectly clear that had the complaint adequately alleged a Fourth Amendment violation the majority of the Court would have sustained the complaint.[19]

This petition, unlike the complaint in *Wheeldin* brings before the Court a classic Fourth Amendment cause of action. And here, it is not necessary to rest upon the

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[17] It is significant in this connection that the Court of Appeals for the District of Columbia in *Shelton* v. *United States*, 327 F. 2d 601 (1963) has only recently held that subpoenas of the same Subcommittee here involved, the Internal Security Subcommittee, are illegal, void and unauthorized when they are issued by one member of the Committee, even if he is Chairman, without the prior authorization and approval of the Subcommittee. Respondent Sourwine testified on deposition in this case as follows:

"Q. Did the Committee or Subcommittee authorize the submission of the subpoenas? A. No."

[18] The majority opinion also holds that the Civil Rights Acts were not applicable in *Wheeldin* since under 42 USC 1983, the respondent there was not acting under color of state law, and no conspiracy was charged invoking 42 USC 1985. Neither of these questions is relevant here since this complaint both charges a conspiracy under 1985 and also charges respondents with acting together with state officials under color of the laws of the state of Louisiana. A cause of action under 1983 and 1985 is clearly stated. See *Monroe* v. *Pape*, *Nesmith* v. *Alford*, *Lee* v. *Hodges*, all *supra*. Cf. *United States* v. *Price*, *supra*.

[19] The dissenting judges, Mr. Justice Brennan, the Chief Justice, and Mr. Justice Black, would have sustained a cause of action in tort even without the Fourth Amendment allegations.

allegations of the complaint alone. The state courts of Louisiana have already held that the arrests were illegal and that the raids and seizures violated the Constitution. See Statement of Facts, *supra*. The material seized was ordered suppressed as evidence by the state courts and this Court itself ordered the immediate return of all papers and documents seized. *Dombrowski* v. *Pfister*, 380 US at p. 498.

The only remaining question under *Wheeldin* would be whether the complaint and record adequately showed respondents' relation to the Fourth Amendment violations sufficient to require a trial of the action. And as to this, the lower court has already held that absent considerations of immunity it would "have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial". Appendix A *infra*. The conclusion is inescapable that under both the majority and dissenting opinions in *Wheeldin* the decision of the lower court ought to be reversed and the respondents should be required to stand trial on the serious charges set forth in the complaint.

6. This petition brings to the Court a clear conflict between the Circuits which ought to be resolved. The conflict presented which urgently requires the intervention of this Court reflects not only fundamental differences in the interpretation of the doctrine of legislative immunity but wholly contradictory results in the application of the doctrine to the same factual record. Upon precisely the same complaint and essentially the same record [20] the Fifth Circuit and the District of Columbia Circuit have come to diametrically opposite conclusions. While the District of Columbia Circuit has apparently concluded that a broad mantle of legislative

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[20] The record in the first action, brought in the Eastern District of Louisiana, contained in addition depositions taken of Chairman Pfister. Petitioners here sought permission to introduce this deposition in the Washington action but the District Court denied a motion under Rule 56(f) for time to file the deposition (31a to 35a).

immunity protects respondents Eastland and Sourwine from the normal processes of law, the Fifth Circuit has concluded that Chairman Pfister of the Louisiana Joint Legislative Committee must stand trial together with the other Louisiana state officers charged to be conspirators and participants in the violation of petitioners' constitutional rights. See Statement of Facts, *supra*.

In a series of opinions, (Appendices D and E), District Judge Ainsworth considered the precise questions raised by these respondents in the District of Columbia, and concluded that since "there is a sharp dispute as to the facts upon which we can conclude whether or not the defendant was engaged in permissible legislative activity" a motion for summary judgment or dismissal must be denied and the defendant must be required to stand trial. Out of a concern for "judicial economy" Judge Ainsworth certified the question for an interlocutory appeal. The Court of Appeals for the Fifth Circuit thereafter dismissed the appeal sustaining the conclusion of the District Court that the Louisiana legislators involved in the charged conspiracy to violate petitioners' constitutional rights must stand trial in a Louisiana Federal Court. *Pfister* v. *Burbank*, Misc. #168, Court of Appeals, Fifth Circuit, 1965.

This presents a sharp and irreconcilable conflict between the Circuits which will result not only in a total disparity of judicial relief in the present case but in continued conflict and confusion in the application of the doctrine of legislative immunity in an area of growing national concern in the enforcement of the Civil Rights Acts. This apparent conflict between the Circuits ought to be resolved by this Court.

7. Regardless of the disposition of the legislative immunity question as to respondent Eastland, the extension of the doctrine by the lower court to immunize the actions of respondent Sourwine was unjustifiable and in clear conflict with controlling decisions of this Court.

Respondent Sourwine is the counsel for the Internal Security Subcommittee. He is not a member of Congress. The constitutional protection of the Speech or Debate Clause does not extend to him. The precise question was settled by this Court in *Kilbourn* v. *Thompson, supra.* In *Kilbourn,* the action was for damages for false imprisonment. The defendants were several members of the House of Representatives and one John A. Thompson, Sergeant-at-Arms of the House. In upholding the immunity cast by the Speech or Debate Clause over the members of the House, the Court specifically and clearly refused to extend the immunity to the Sergeant-at-Arms, and directed that the judgment of dismissal must be reversed as to him and the case remanded for further proceedings. Thus the Court concludes in Kilbourn:

> "... we think the plea set up by those of the defendants who were members of the House is a good defense, and the judgment of the court overruling the demurrer to it and giving judgment for those defendants will be affirmed. As to Thompson, the judgment will be reversed and the case remanded for further proceedings."

103 US at p. 205.[21] The lower court's extension of the legislative immunity doctrine to immunize the wrongful acts of respondent Sourwine was in complete conflict with the direct holding of this Court in *Kilbourn* and should be reviewed and reversed.[22]

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[21] The plaintiff later recovered a money judgment for $20,000 against Thompson, the Sergeant-at-Arms. See Goldfarb, *The Contempt Power,* (Col. Univ. Press 1963) p. 34.

[22] The vitality of the *Kilbourn* insistence that the legislative immunity doctrine applies only to members of a legislature is evidenced in the Court's reaffirmation of this limitation in *Tenney* v. *Brandhove, supra.* Mr. Justice Frankfurter wrote for the majority: "It should be noted that this is a case in which the defendants are members of a legislature. Legislative privilege in such a case deserves greater respect than where an official acting on behalf of the legislature is sued or the legislature seeks the affirmative aid of the courts to assert a privilege. In *Kilbourn* v. *Thompson, supra,* this Court allowed a judgment against the Sergeant-at-Arms, but found that one could not be entered against the defendant members of the House."

The lower court appears to concede that under *Kilbourn* no immunity extends to respondent Sourwine, but suggests that the *Kilbourn* holding has in some way been modified by this Court's decision in *Barr* v. *Matteo*, 360 US 564. This, however, was precisely the position urged in *Wheeldin* and repudiated by the Court. Mr. Justice Douglas' comments in the majority opinion are that "there is much discussion in the briefs of *Barr* v. *Matteo*, 360 US 564", and then points out "But that was a libel action brought against a federal official in the District of Columbia", 373 US at 650. *Barr*, as Justice Douglas indicates, reflects a judicially developed law of privilege relating to officers of the Executive Branch of government, while questions of legislative privilege are constitutional in nature deriving their authority from Article I, Section 6. See *Barr* v. *Matteo*, opinion of Mr. Justice Harlan at p. 569.

The considerations which led the majority of the Court in *Barr* v. *Matteo* to extend the executive privilege to the Acting Director of the Office of Rent Stabilization are not applicable in the area of legislative activity. The policy considerations underlying the decision of the sharply divided Court in *Barr* v. *Matteo* to so extend the executive immunity reflected a concern with "the effective functioning of government" in a period of "complexities and magnitude of governmental activity". 360 US at p. 564. The policy considerations underlying the Speech or Debate Clause are very different. They reflect, as the Court discusses in *United States* v. *Johnson, supra*, the necessity for protecting the free speech and independence of legislators. These principles are not primarily involved when employees of a legislature such as the Sergeant-at-Arms of the House, as in *Kilbourn*, or the counsel to a Senate Committee, as here, are held accountable at law for otherwise wrongful acts.

Moreover, even if *Barr* v. *Matteo* were extended to cover legislative employees, and further extension of its doctrine would raise serious policy questions, see the dissenting

opinions of the Chief Justice and Mr. Justice Douglas, Mr. Justice Brennan and Mr. Justice Stewart, 360 US at pps. 579, 586 and 592, it could not be read so as to impose any immunity upon the charged acts of respondent Sourwine. Sourwine is charged with participation in a conspiracy under color of Louisiana laws to contrive false arrests and to carry through illegal raids and seizures for the purpose of interfering with the protected rights of citizens. His claim to colorable authority resulting in immunity lies in his use of subpoenas signed in blank by respondent Eastland, unauthorized by the Committee itself. See Statement of Facts, *supra,* and point 5 *supra,* Reasons for Granting the Writ. As in *Wheeldin* v. *Wheeler,* the doctrines of *Barr* v. *Matteo* have no applicability here. Sourwine, as Wheeler, "was not acting sufficiently within the scope of his authority to bring the doctrine into play". *Wheeldin* v. *Wheeler,* opinion of Mr. Justice Douglas, 373 US at p. 647.

The concurring opinion of Mr. Justice Black in *Barr* v. *Matteo,* without which there would not have been a Court, is most instructive in this respect. Mr. Justice Black joined the Court on the assumption that the activity of the government official complained of was "neither unauthorized nor plainly beyond the scope of Mr. Barr's official business but instead related more or less to general matters committed by law to his control and supervision." 360 US at pps. 577 and 578.

The activity of respondent Sourwine was "unauthorized" by the Committee. See point 5 *supra;* cf. *Shelton* v. *United States, supra.* And it is certainly clear that participating in the planning of illegal arrests, raids, and seizures in violation of the Constitution was "plainly beyond the scope" of Mr. Sourwine's "official business".[28]

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[28] It must be stressed here that the lower court has found that as to the question of whether respondents Sourwine and Eastland "were parties to a knowing concert of action with the state officials" it "would have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial." Appendix A, *infra.*

Under the definitions of the concurring opinion in *Barr*, no immunity attaches to the charged activities of respondent Sourwine.

8. If, on the other hand, *Barr* v. *Matteo* could be read as sanctioning the immunizing of respondent Sourwine's conduct in this case, that decision ought to be reconsidered. In his dissenting opinion in *Barr*, joined in by Mr. Justice Douglas, the Chief Justice pointed out that the extension of an absolute privilege of immunity to the government official there involved "can only have the added effect of deterring the desirable public discussion of all aspects of our Government and the conduct of its officials". 360 US at p. 585. The effect of such an extension of the immunity doctrine, the Chief Justice concluded, would be to "sanctify the powerful and silence debate". 360 US at p. 585. The Chief Justice's warning is even more relevant in the circumstances of the present case. Extension of a doctrine of immunity to employees of congressional committees investigating political opinions and associations of citizens would be to encourage lawless and arbitrary action in a field in which considerable concern has already been expressed as to the impact of legislative investigative activity upon the sensitive area of First Amendment liberties. See *Watkins* v. *United States*, 354 US 178; *DiGregory* v. *New Hampshire*, — US —, 86 S. Ct. 1148, #396 this Term; Cf. *Gojack* v. *United States*, cert. granted, 382 US 937, #594 this Term. As in *Barr*, "this is a much more serious danger than the possibility that a government official might occasionally be called upon to defend his actions and to respond in damages". *Barr* v. *Matteo*, 360 US at 585. Furthermore, the caution raised by Mr. Justice Brennan in his dissenting opinion in *Barr* is most appropriate here. The Justice warned that "the courts should be wary of any argument based on the fear that subjecting government officers to the nuisance of litigation and the uncertainties of its outcome may put an undue burden on the conduct of the public business". 360 US at pps. 588

and 589. Requiring the respondent to stand trial on the charges of conspiring to contrive false arrests and illegal raids and seizures no more places an "undue burden on the conduct of the public business" than does requiring the defendant in *United States* v. *Johnson* to stand trial for charges of conspiring to defraud the United States. As the dissenting Justices in *Barr* conclude, the public interest is far greater served by permitting citizens recourse to legal remedies for wrongs committed upon them by government officials than by immunizing the wrongful conduct out of a perhaps unfounded concern that litigation may impede the proper functioning of government. See Mr. Justice Brennan's opinion in *Barr* v. *Matteo,* 360 US at p. 589.

9. The district court dismissed the cause of action for equitable relief, without a hearing on the allegations, treating the action as a request for injunctive relief against a Committee of the Senate. Invoking the principle of "separation of powers" the district court stated that "this Court may not enjoin a Congressional Committee from pursuing its activities", Appendix B, *supra,* and dismissed the complaint for want of jurisdiction.

The Court of Appeals properly disregarded this contention pointing out that the complaint did not seek to enjoin the Senate Committee in any respect, but that the relief sought was directed solely against the individual respondents. As the Court of Appeals conceded the complaint did not seek injunctive relief against the functioning of a Congressional Committee. The gravamen of the cause of action, insofar as it affected respondents Eastland and Sourwine, was the charge that these individuals, together with other individuals, participated in a plan of conspiracy to utilize the laws of the State of Louisiana to deprive the appellants of rights, privileges and immunities secured to them by federal law. *Cf. Monroe* v. *Pape, supra,* see Title 42 U.S.C. 1983, 1985.

The complaint further charged that these individuals "without warranty or authority of law" pursuant to the conspiracy "secretly and surreptitiously" were in possession of certain books, records and other documents which had been seized in the illegal raids of October 4th conducted under color of laws of the State of Louisiana (see Complaint, paragraph 22 (7a)).

The complaint went on to charge that "in order to evade the jurisdiction" of the United States District Court for the Eastern District of Louisiana, the respondents transferred certain of these documents and records to the District of Columbia and that these "are presently in the possession of defendants Eastland and Sourwine in the District of Columbia". Other documents and records belonging to petitioners were "also secretly and surreptitiously transferred to a State Court House in the State of Mississippi and are presently in the possession of defendant Eastland" (Complaint, Paragraph 22 (7a)).

The complaint nowhere charged that the illegally seized records or documents were in the custody or possession of the Senate Committee. It charged solely that they were illegally and without "warrant of law" in the possession of the individual respondents, Sourwine and Eastland, who had obtained them pursuant to a conspiracy to utilize Louisiana state laws to violate appellants' federally protected rights.

This complaint clearly states a cause of action for equitable relief under the Civil Rights Act. *Hague* v. *CIO*, 307 U.S. 496; *Bush* v. *New Orleans Parish School Board*, 188 F. Supp. 916, aff'd 365 U.S. 569; *Jordan* v. *Hucheson*, 323 F. 2d 597 (C.A. 4, 1963), and cases cited *supra*. The conspiracy charged is one to utilize state laws to interfere with federally protected rights. The doctrine of separation of powers has no relevance here. The complaint charges that respondents, together with legislative and executive officials of the state, conspired to use state law to conduct

the illegal raids. The fact that they are "legislative" officers, has no impact upon the power of a federal court to grant equitable relief.

As far as the complaint was concerned, and that was all that was properly before Judge Holtzoff on the motion to dismiss, *Clark, Attorney General* v. *Vebersee Firanz Korporation,* 332 US 480, injunctive relief was sought to restrain these respondents who had participated in a conspiracy under color of state law, from using or disposing of the fruits of the illegal searches and seizures. There was no allegation whatsoever that the illegally seized material was in the possession of the Senate Committee, nor was any injunctive relief sought against the Committee. As a matter of fact, the complaint alleged that a good portion of the illegally seized material was then sitting in the private possession of respondent Eastland in a state courthouse in the State of Mississippi (7a).[24]

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[24] Paragraph 22 of the Complaint states:

"22. In further pursuance of this conspiracy defendants Burbank, Willie and Pfister, at the request of defendants Eastland and Sourwine secretly and surreptitiously, without warrant or authority of law, transferred a portion of said books, records, documents and other articles belonging to the plaintiffs out of the jurisdiction of the United States District Court for the Eastern District of Louisiana. Plaintiffs had instituted in that Court a proceeding under appropriate federal statutes to obtain the return of said documents and articles, and to receive appropriate redress under the law for the illegal acts of the defendant conspirators. In order to evade the jurisdiction of that Court, the defendants caused to be transferred a portion of the said documents, records and other articles to the District of Columbia. Upon information and belief said documents, articles and records are presently in the possession of defendants Eastland and Sourwine in the District of Columbia. Other documents and records, all belonging to the plaintiffs, illegally and in violation of the Constitution of the United States seized from them, were also secretly and surreptitiously transferred to a State Court House in the State of Mississippi, and are presently in the possession of defendant Eastland."

The Court of Appeals does not rest its affirmance upon the jurisdictional grounds invoked by the District Court. Instead it bases its sanction of the dismissal of the equitable cause of action purely upon its conclusion that the equitable relief sought against the individual respondents would not be effective since other "members of the Subcommittee would still have unfettered use of the documents". Appendix A, *infra*. [25] This portion of the opinion of the lower court is based upon an assumption that although the complaint probably adequately states a cause of action for equitable relief against the individual respondents,[26] it should be dismissed because the relief sought, although otherwise valid, may have been frustrated by subsequent actions of the respondents in turning the seized documents over to the Senate Committee. That this assumption was wholly unwarranted is apparent in light of the record before the district court at the time of dismissal. The fact that the seized materials, first removed at midnight on the evening before a federal court hearing, out of the

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[25] The lower court relied upon this Court's statement in *Virginia Ry. v. System Federation No. 40*, 300 US 515, 550 (1937), that "A court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of no benefit to the plaintiff." What the lower court did not mention was that in *Virginia Ry.*, this Court *upheld* the granting of equity relief pointing out that "whether the decree will prove so useless as to lead a court to refuse to give it, is a matter of judgment to be exercised with reference to the special circumstances of each case rather than to general rules which at most are but guides to the exercise of discretion" 300 US at p. 551. It is perfectly clear that under *Virginia Ry.* this "exercise of discretion" can be engaged in only after a hearing on the facts of "the special circumstances of each case" 300 US at p. 551.

[26] It would be difficult indeed to hold that the complaint did not state a cause of action for equitable relief against the individual respondents in view of this Court's holding in *Dombrowski* that the allegations there stated a cause of action under Title 42 USC 1983. 380 US at p. 490.

reach of the jurisdiction of the federal court, see Statement of Facts, *supra,* then deposited in the sanctuary of a Mississippi chancery clerk's office safe from the process of the Eastern District of Louisiana, see Statement of Facts, *supra,* were now in the Washington offices of the Internal Security Subcommittee of the Senate, was hardly a reason to assume that an injunction permanently restraining the individual respondents from using the fruits of the illegal raids and seizures would be "of no benefit to the plaintiffs". Cf. opinion of lower court, Appendix A, *infra.*

At a minimum, petitioners were entitled to a hearing on their complaint at which time the respondents' defense of futility to the plea for equitable relief could have been tested. See *Virginia Ry.* v. *System Federation, supra.* Among the many issues petitioners were entitled to litigate would have been the highly pertinent question as to whether the individual respondents retained copies of the seized documents, particularly the membership lists illegally taken, and whether they had given these copies to other individuals throughout the country. At this moment petitioners can only speculate as to where these copies, admittedly made by respondents, are now located.[27]

To sanction the dismissal of the equity provisions of the complaint on the ground that the actions of the respondents had in effect frustrated any possibility of legal

[27] This Court is well aware of the use sought to be made of membership lists of civil rights organizations in certain areas of the Southern states. Cf. *NAACP* v. *Alabama; NAACP* v. *Flowers; Louisiana* v. *NAACP,* all *supra.* Since the decision of the Court in *NAACP* v. *Alabama* it has become increasingly clear that enforced production of membership lists of civil rights organizations active in the Southern states itself violates the Constitution. The Complaint charges that a central purpose of the conspiracy was to utilize the Louisiana laws as a pretext for the staging of raids during which the membership lists could be seized—lists not otherwise obtainable to the Southern authorities through lawful legislative process, state or national.

relief, would be to lend judicial approval to the extraordinary course of events set off by the October raids. The Louisiana state court could not order the return of the seized materials when it quashed the original arrest warrants because it was told by the state participants in the conspiracy that the seized materials were technically not in their hands but under the control of the respondents. The Louisiana federal court to which the petitioners then turned for relief could not order the materials returned because they were spirited out of its jurisdiction by these respondents the night before the hearing on a temporary restraining order, into the sanctuary of a Mississippi Chancery Clerk's office, safely across the Louisiana border. And when federal process finally caught up with the respondents in the District of Columbia in the form of this action, petitioners were faced with the final frustration of any legal recourse—the conclusion of the lower court that petitioners were too late since respondents had safely deposited the illegally obtained material in hands supposedly beyond the reach of the law.[28]

The peremptory dismissal of the equitable cause of action not merely legitimates a course of conduct designed to frustrate any effort to invoke the processes of law, state and federal, to protect these petitioners from the harmful effect of raids and seizures both the Louisiana Courts and this Court have condemned as unlawful. It frustrates the mandate and decree of this Court. In *Dombrowski,* the Court ordered the District Court to frame a decree providing for the immediate return of all papers and documents seized. The reinstatement of the equitable cause of action in this case would permit the enforcement of the decree of this Court in respect to these individual respondents since, by their own admissions, copies of all

[28] The entire story of this unsuccessful legal pursuit of the illegally seized materials is set forth in the Statement of Facts and the record of the case.

seized materials have been retained. (Affidavit of respondent Sourwine (46, 47a).

10. This petition has brought before the Court a series of questions which touch the fundamentals of a free society. In essence they raise the issue as to whether any man by virtue of his power, his status, or his authority, is wholly above the law.

In this case a United States Senator, together with his assistant, is charged with participating in a conspiracy together with officials of the State of Louisiana to use laws of the state to procure the false arrest of citizens, to arrange for illegal raids and seizure of their property, for the purpose of intimidating and frightening them and other citizens from exercising the rights of speech, press and assembly to bring about the elimination of racial segregation and discrimination. The laws of the United States provide for remedies against such conduct. The Civil Rights Acts were designed for this very purpose. This Court must now decide whether the remedies the Congress has provided will be denied to these petitioners because the participants in the conspiracy to bring about results this Court has already condemned in *Dombrowski* v. *Pfister* include men whose status places them above the law. In *Marbury* v. *Madison* this Court said, in the first days of the Republic, that "The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right".

In reviewing the opinions below and reversing the judgments, this Court would be reaffirming these words.

CONCLUSION

The petition for the writ of certiorari should be granted, and the judgments below reversed.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,435

No. 18,544

JAMES A. DOMBROWSKI, *et al.*,

Appellants,

v.

COLONEL THOMAS D. BURBANK, *et al.*,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PER CURIAM: The appellants in this case are a Louisiana civil rights organization and its executive director. Their complaint in the District Court sought injunctive relief and damages under 42 U. S. C. §§ 1983 and 1985. The first of these appeals, No. 18,435, is from an order dismissing the claim for injunctive relief. The second, No. 18,544, is from the grant of appellees'[1] motion for summary judgment on the claim for damages.

The complaint alleged in substance that various Louisiana officials, in league with appellees, illegally

[1] Although the complaint named a number of defendants, most of these appear to be residents of Louisiana upon whom service of process was not effected. Appellees are the only two defendants who were served; and they are, respectively, the Chairman and the Chief Counsel of the United States Senate Internal Security Subcommittee.

searched the offices of appellants and seized documents and records.[2] These papers, while in the possession of the Louisiana officials, were subjected to a subpoena issued in the name of the United States Senate Internal Security Subcommittee. Compliance with this subpoena resulted in the transfer of the seized papers to the custody of the Senate Subcommittee which, in plenary session, made provision for their handling by the resolution set forth in the margin.[3] Appellants, asserting that the subpoena was

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[2] A detailed description of this action is contained in *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). The Supreme Court in that case, decided while the instant appeals were under submission, invalidated the Louisiana statute under which the Louisiana officials purported to act, and directed that the relief to be afforded by the District Court in Louisiana should include "ordering immediate return of all papers and documents seized."

[3] The full entry in the Subcommittee's minutes is as follows:

November 14, 1963

Upon the conclusions of the testimony of the second of two witnesses heard in executive session, the Subcommittee considered and discussed the handling of material subpoenaed from the Joint Legislative Committee on Un-American Activities of the State of Louisiana.

Present: Senators Eastland, Dodd, Hruska, Dirksen, and Scott.

After discussion, and on motion of Senator Dirksen, it was ORDERED that the Chairman be authorized to appoint a Task Force consisting of Senators Eastland, Johnson, Dodd, Hruska and Scott to evaluate the subpoenaed material progressively with respect to its value to the Subcommittee's investigation and to make determination from time to time respecting particular papers, documents, or other material to be inserted verbatim in the record of the Subcommittee; that all of the material not clearly irrelevant to the Subcommittee's investigation of Communist activity generally, of Communist front activity, of Communist infiltration of organizations and groups, and/or the source of funds for Communist, or Communist front activities be ordered into the Committee's hearing record by reference subject to the later determination of the Task Force respecting particular items which should be entered into the record verbatim; and that all of the original records obtained under the subpoena be photostated for the permanent records of the Subcommittee and, when so photostated, be returned promptly to the posses-

deficient in authority from the Subcommittee, seek damages, as well as an injunction requiring appellees to return their records and to refrain from using them.

No. 18,435

Appellants' complaint alleged that the seized materials were in the possession of appellees. However, the affidavits submitted in opposition to appellants' motion for a preliminary injunction revealed that the Senate Subcommittee had incorporated the documents in its hearing record and made express provision for their examination and disposition by the collective act of the Subcommittee. See note 3 *supra*.

Since the seized materials must thus be regarded as in the possession of the Senate Subcommittee,[4] a judicial command addressed solely to appellees—one member of the Subcommittee and one of its staff—cannot be assured of effect. The test, set forth by the Supreme Court in

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sion of the Joint Legislative Committee on Un-American Activities of the State of Louisiana.

James O. Eastland, Chairman

I consent and agree to the foregoing procedure.

John F. McClellan
Olin D. Johnston
Roman L. Hruska

[4] Appellants contend that the trial court, in dismissing the prayer for injunctive relief, should have limited its consideration to the allegations of the complaint. Reliance is placed upon *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485 (1900), for the proposition that all of the allegations of the complaint must be regarded as true on a motion to dismiss a bill in equity on its face. But even in *Mast, Foos & Co.*, the Court regarded consideration of affidavits as appropriate. 177 U. S. at 495. See also Rule 12, FED. R. CIV. P.; MOORE, FEDERAL PRACTICE ¶ 12.09 (2d ed. 1964). What the Court disapproved was dismissal when a question of fact was involved. On this record, in light of the affidavit setting out the Subcommittee resolution, the dismissal does not involve the resolution of any question of fact which may fairly be regarded as disputed.

Williams v. *Fanning*, 332 U. S. 490, 494 (1947), of the indispensability of a superior to a suit for injunctive relief against a subordinate is whether "the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." *Cf. Hynes* v. *Grimes Packing Co.*, 337 U. S. 86 (1949). Of course, there is only partly present in this case a relationship between a superior and a subordinate official as there was in *Williams*; nevertheless, the problem of requiring a subordinate official to undertake acts capable of accomplishment only by his superior, which seems central to the purpose of the *Williams* test, also characterizes the difficulties implicit in requiring either of the appellees to return documents held by the full Senate Subcommittee.[5]

The dismissal of appellants' request for injunctive relief to prevent appellees from using the seized records also flows from the undisputed fact that the materials are in the custody of the Subcommittee. Since the documents are now held by the Subcommittee, they are accessible to the appellees only by virtue of their official positions with that body. We cannot prohibit, nor are we asked to prohibit, appellees' use of the documents in the course of their official business for the Subcommittee; and neither do appellants seek any restraint upon the Subcommittee itself. See *Hearst* v. *Black*, 66 U. S. App. D. C. 313, 87 F. 2d 68 (1936), where this court refused to enjoin a congressional committee from using information it had obtained by illegal means. There, considerations resting upon a proper allocation of powers and responsibilities among the coordinate branches of the federal system impelled

[5] See also *Blackmar* v. *Guerre*, 342 U. S. 512 (1952). That was a suit for reinstatement by a discharged government employee. Because the Civil Service Commissioners were not parties to the suit, and the only defendant before the court could not grant the requested relief without their approval, the Court held that dismissal of the suit was proper.

this court not to exercise its equity powers.[6] In any event, however, the relief requested here is directed solely at appellees. Disclosure of the documents in the course of the Subcommittee's official action would not be prevented by the decree prayed for against appellees; and all other members of the Subcommittee would still have unfettered use of the documents. "A court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of no benefit to the plaintiff." *Virginia Ry.* v. *System Federation No. 40,* 300 U. S. 515, 550 (1937).

No. 18,544

Appellees contend that the grant of their motion for summary judgment was proper because (1) appellants failed to put forward a serious claim that appellees were parties to a knowing concert of action with the state officials, and (2) in any event, the doctrine of legislative immunity insulates appellees from suit. Were only the former involved, we might have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial. But we need not pursue that inquiry since we think the record before the District Court contained unchallenged facts of a nature and scope sufficient to give appellees an immunity against answerability in damages for actions taken in the course of their legislative activities.[7]

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[6] See also *Jordan* v. *Hutcheson,* 23 F. 2d 597 (4th Cir. 1963); *Pauling* v. *Eastland,* 109 U. S. App. D. C. 342, 288 F. 2d 126, *cert. denied,* 364 U. S. 900 (1960); *Mins* v. *McCarthy,* 93 U. S. App. D. C. 220, 209 F. 2d 307 (1953). See generally *Developments in the Law-Remedies Against the United States and Its Officials,* 70 HARV. L. REV. 827 (1957).

[7] It is settled by *Tenney* v. *Brandhove,* 341 U. S. 367 (1951), that such immunity provides a defense to actions brought for damages under the Civil Rights Act. See also Comment, 40 NOTRE DAME LAW. 70 (1965); Note, 68 HARV. L. REV. 1229 (1955). For general discussions of the Civil Rights Act, see Comment, 49 CALIF. L. REV. 145 (1961), Note, 66 HARV. L. REV. 1285; Comment, 74 YALE L. J. 1462 (1965).

The issue, in the large, is whether the actions taken with respect to appellants' records were within the scope of appellees' duties for the Senate Subcommittee. Citing our decision in *Shelton* v. *United States*, 177 U. S. App. D. C. 155, 327 F. 2d 601 (1963), appellants argue that the subpoenas were invalid because they were issued and executed without the prior authorization of the Subcommittee, as distinct from its Chairman. *Shelton*, however, held only that a person compelled to testify before a Senate Subcommittee by an invalid subpoena could not be convicted of contempt for failing to respond to the Subcommittee's questions. No necessity existed there for considering the dangers of inhibiting the legislative process by the threat of personal liability to those engaged in it. These are at the core of the public policies reflected in the immunity doctrine.[8]

The Internal Security Subcommittee is required by Senate Resolution to investigate "the extent, nature and effect of subversive activities in the United States. . . ." S. Res. 62, 88th Cong. There is no question that the Senate may legitimately conduct such investigations. As has been said, "The power of Congress to conduct investigations is inherent in the legislative process. That power is broad." *Watkins* v. *United States*, 354 U. S. 178, 187 (1957); see also *Tenney* v. *Brandhove*, 341 U. S. 367, 377-78 (1951). Appellants' own affidavits establish that, for more than a decade, the Subcommittee has evinced an active interest in appellants. As the Subcommittee's Chairman and Chief Counsel, respectively, appellees have immediate responsibilities in the Subcommittee's operations. It is true that the records held by the Louisiana Committee were subpoenaed without prior authorization from the Subcommittee, although the Chairman expressly approved in advance the action pro-

[8] That different considerations are involved when the personal liability of the legislators is involved is illustrated by the facts in *Yellin* v. *United States*, 374 U. S. 109 (1963), which was relied upon in *Shelton*.

posed to be taken. But this action was shortly brought by appellants to the attention of the Subcommittee as a whole, which discussed the matter of the subpoenaed papers. After such consideration the Subcommittee, by formal resolution, incorporated the papers in its hearing record, and provided for their ultimate disposition.

Whether this apparently approving action by the full Subcommittee would serve as a *nunc pro tunc* ratification and consequent validation of the subpoena for all purposes, we need not decide. We do regard it as serving to keep appellees' acts in pursuing the Subcommittee's long-standing interest in appellants within the mainstream of legislative effort to a degree adequate to protect against liability in damages for issuing and executing the subpoena. Appellees acted in an area in which the Subcommittee was competent to function. Had appellees received Subcommittee authorization before issuing the subpoena, the official nature of their actions would be evident. Acting first and receiving authorization later does not, under the facts of this case, put their actions beyond the pale of official legislative activity, at least for purposes of the immunity doctrine.[9]

Nor does *Wheeldin* v. *Wheeler*, 373 U. S. 647 (1963), compel a different result. The plaintiff there sought damages from an investigator for the House Un-American

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[9] What appellants essentially contend is that appellees, by acting without prior authorization, acted with a malicious purpose, *i.e.*, to further a conspiracy to deprive appellants of their civil rights. *Tenney* v. *Brandhove*, however, precludes inquiry into appellees' motives to determine the legitimacy of their conduct:

> The claim of an unworthy purpose does not destroy the privilege. . . . The privilege would be of little value if they [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher* v. *Peck*, . . . that it was not consonant with our scheme of government to inquire into the motives of legislators, has remained unquestioned. 341 U. S. at 377.

Appendix A

Activities Committee for the allegedly malicious act of serving a subpoena which had been approved by no one, either before or after its issuance. In the Supreme Court the Solicitor General conceded that the complaint on its face showed the defendant to be acting wholly outside the scope of his official duties; and this concession prompted the Court, in the course of otherwise holding that no federal cause of action was made out by the complaint, to note that the immunity doctrine had no relevance. Here, unlike *Wheeldin*, the record before us shows without dispute not only that the subpoena was expressly authorized in the first instance by the Chairman of the legislative committee, but also that the full committee ratified the action taken when the matter was promptly brought to its attention. Even if it be assumed that there remained a legal hiatus in the title of the subpoenaing authority, immunity from suit is not thereby destroyed. As was said by the dissenting judge in *Wheeldin:* "The question of authority is, of course, distinct from that of immunity from civil suit. Even an unauthorized act may be within the scope of the immunity, so long as it is within the 'outer perimeter' of the officer's 'line of duty.'" [10] 373 U. S. at 656 n. 4. This is, of course, "a matter of defense," but summary judgment may rest upon such a defense where, as here, its existence is established by facts which are undisputed.

Finally, appellants contend that because they charge appellees to have conspired with various officials under the color of *state* law, appellees can claim no immunity because

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[10] Judge Learned Hand once put the point in these terms:

"[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake in the face of which an official may later find himself hard put to satisfy a jury of his good faith. . . . [I]t has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try

of their positions with the Senate Subcommittee. It is argued that appellees' positions with that body must be regarded as incidental and irrelevant to the present suit; and that appellees are to be viewed as in the position of any other citizen. This, however, ignores that the conduct of which appellants complain (appellees' activities pursuant to the subpoena) could not have been undertaken had appellees had no official legislative positions and responsibilities.[11]

The judgments of the District Court are

Affirmed.

Washington, *Senior Circuit Judge*, did not participate in this decision.

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to do their duty to the constant dread of retaliation." *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U. S. 949 (1950).

See also *Barr* v. *Matteo*, 360 U. S. 564 (1959); *Cooper* v. *O'Connor*, 69 U. S. App. D. C. 100, 99 F. 2d 135, *cert. denied*, 305 U. S. 642 (1938); *Brownfield* v. *Landon*, 113 U. S. App. D. C. 248, 307 F. 2d 389, *cert. denied*, 371 U. S. 924 (1962); *Bershad* v. *Wood*, 290 F. 2d 714 (9th Cir. 1961).

[11] Although it has been suggested that the protection of the legislative immunity doctrine does not extend to appellee Sourwine, cf. *Kilbourn* v. *Thompson*, 103 U. S. 168 (1880), what was said in *Barr* v. *Matteo* about the immunity of executive officials seems persuasive here. "The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions . . ." 360 U. S. at 572-73. See also, *Cooper* v. *O'Connor*, *supra*; *Bershad* v. *Wood*, *supra*.

APPENDIX B

The Court: This is an action against Senator Eastland, the Chairman of the Senate Judiciary Committee, J. G. Sourwine, the counsel of one of the subcommittees of that Committee, and numerous other defendants. Only Senator Eastland and Mr. Sourwine have been served with process. The other defendants have not been served and have not appeared and consequently they are not before the Court.

The action has two aspects insofar as the two defendants who have appeared are concerned. First, it seeks an injunction against the reproduction and use of certain documents that have come into the possession of the Senate Judiciary Committee. Second, it seeks money damages. Although in form only one count is set forth, actually there are two claims for relief or two causes of action, which for the sake of clarity should be set forth as two separate counts.

The plaintiff has moved for a preliminary injunction against the two defendants who have appeared and now seeks to withdraw that motion, stating, however, that it desires to renew it if it can secure additional evidence which it proposed to do, in part at least, by taking the deposition of one of the defendants.

Counsel for the two defendants contend that the cause of action for an injunction does not set forth a valid claim for relief and that under no set of circumstances that could be proven thereunder could the plaintiff prevail and counsel for the two defendants accordingly ask the Court to dismiss that cause of action as to them at this time.

This procedure has been approved by the Supreme Court in Mast Foos & Company v. Stover Manufacturing Company, 177 U. S. 485, 495.

This case involves the basic principle of constitutional law of separation of power. Sometimes we tend, amidst dealing with numerous details, to forget the basic principles

of law and it is useful occasionally to refresh ourselves at the fountain of the basic principles.

It is elementary that our Federal Government is divided into three coordinate branches. No one of the three may interfere with the activities of either of the other two except in the limited matters as provided by other provisions of the Constitution. Consequently, this Court may not enjoin a Congressional committee from pursuing its activities.

If any authority is needed to support this elementary principle the Court may refer to Hearst v. Black, 66 App. D. C. 313, in which in an opinion written by Judge Groner the Court of Appeals for this jurisdiction held that a Senate committee could not be enjoined from making use of certain telegrams which had come into its possession and which it was claimed by the plaintiff had been seized illegally.

In Methodist Federation For Social Action v. Eastland, 141 F. Supp. 729, a Three-Judge Court in this District, in an opinion written by Circuit Judge Edgerton, held that the courts could not enjoin a subcommittee of the Senate Committee on the Judiciary from printing and circulating a pamphlet. In this case Judge Edgarton made this significant statement:

> "We have no more authority to prevent Congress or a committee or public officer acting at the express direction of Congress from publishing a document than to prevent them from publishing the Congressional Record. If it unfortunately happens that a document which Congress has ordered published contains statements that are erroneous and defamatory and are made without allowing the persons affected an opportunity to be heard, this adds nothing to our authority. Only Congress can deal with such a problem. The Constitutional history called to our attention includes no instance in which an English court has attempted to restrain Parliament or an American

court to restrain Congress from publishing any statement. This history therefore tends to confirm our view."

In the light of this discussion the Court will dismiss as to defendants Senator Eastland and Mr. Sourwine the alleged claim for an injunction.

You may submit an order accordingly.

APPENDIX C

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

SECTION B

No. 183 459

Vio. R. S. 14:360

STATE OF LOUISIANA

against

JAMES A. DOMBROWSKI

JUDGMENT

On January 29, 1964 the Orleans Parish Grand Jury found a True Bill against the defendant, charging said defendant with violating Revised Statute 14:360. On March 5, 1964 the defendant, through his counsel of record,

filed a Motion for Prayer for Oyer and a Motion to Suppress the evidence. Hearing was had on the Motion to Suppress on March 23, 1964 and at the conclusion of the presentation of evidence and brief argument by both the State and the Defense, the matter was continued as an open matter for purposes of filing briefs. Briefs were received by the Court from both the State and Defense at which time the matter was taken under advisement. At the same time, the time of the presentation of the briefs, counsel for defendant filed a Plea of Res Judicata and, accordingly this, too, was taken under advisement. On May 28, 1964 the State, through the Assistant District Attorney, filed its Answer to the Plea of Res Judicata and other memoranda in support of their positions. The matter was then set for further argument on June 9, 1964.

As to the Plea of Res Judicata counsel for defense cites to the Court that this matter Case No. 181 975 of Section E of the Criminal District Court for the Parish of Orleans involving the same defendant, and the same Search Warrants here involved, found that the State witnesses "obviously have not justified the arrest . . ." and ". . . since there has not been a prima facie case made against these three defendants and, therefore discharges them without date." (Transcript of the record.)

Counsel for defendant points out that since they found the [sic] Arrest Warrants of the defendant was found to be illegal then, necessarily, the Search Warrants, issued concurrently with the Arrest Warrants, and upon the same application, are also illegal and Pleads Res Judicata, citing to the Court the recent decision of the Supreme Court of Louisiana in the case of State v. Latil, 92 So. 2, 63; and quoting other decisions. The State, in its argument, admits the hearing in Section E of this Court, admits the determination as regards the validity of the arrest warrant,

but denies that there was a determination of the identical, factual and legal issues were involved.

This Court must accept the argument of the defendant and reject that of the State.

On the question of the suppression of the evidence, both the defense and the State have presented this Court with lengthy arguments and briefs. Needless to say, the historic Mapp v. Ohio (367 U. S. 643, 81 S. Ct. 1686, 1961) was cited to the Court by the defendant, along with many, many other citations. Further, in the matter of Marcus et al. v. The Search Warrant of Property, etc., 367 U. S. 717 the Court found that the authorities in seizing more property than that which was specifically declared in the warrant acted illegally. This is particularly what took place in this matter presently before this Court; even to the extent that the State has offered to return to the defendant all of the material which they do not consider contraband.

The Court feels that *at least* in view of the two cases cited supra, not to mention other grounds, that the State exceeded its authority in carrying out this search and seizure, and accordingly,

It is ORDERED, ADJUDGED and DECREED that the Motion to Suppress and the Plea of Res Adjudicata herein filed be and the same are hereby Maintained.

JUDGMENT READ, RENDERED and SIGNED IN OPEN COURT THIS 12th day of JUNE 1964.

/s/ George P. Platt
GEORGE P. PLATT,
Judge, Section B.

Clerk's Office, June 15, 1964.
A TRUE COPY.

GEO. SMITH, *Deputy Clerk,*
Criminal District Court,
Parish of Orleans.

APPENDIX D

Minute Entry
April 20, 1964
AINSWORTH, J.

No. 13967
CIVIL ACTION
DIVISION D

JAMES A. DOMBROWSKI, *et al.*,

versus

COLONEL THOMAS D. BURBANK, *et al.*

This matter came on for hearing on a former day on motion of defendant, James H. Pfister, to dismiss or, in the alternative, for summary judgment. The court, having heard the argument of counsel and having considered the briefs, affidavits and deposition in support thereof, is now ready to rule.

IT IS ORDERED that motion of defendant, James H. Pfister, to dismiss be, and the same is hereby, DENIED.

REASONS

Mover, a member of the Louisiana Legislature is entitled to absolute immunity under the doctrine of *Tenney* v. *Brandhove*, 341 U. S. 367, 71 S. Ct. 783 (1951), if the affidavits and deposition submitted by the parties indicate that he was acting at the time "in the sphere of legitimate legislative activity." Here there is a sharp dispute as to the

facts upon which we can conclude whether or not the defendant was engaged in permissible legislative activity on the dates when he is alleged to have committed tortious acts against plaintiff. As was said in *Tenney*, supra, "The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive. The present case does not present such a situation." The United States Supreme Court decision was therefore predicated upon the state of facts which it found in the *Tenney* case. Since there is a genuine issue as to material facts, summary judgment is not permissible under Rule 56 of the Federal Rules of Civil Procedure. See National Screen Service Corp. v. Poster Exchange, Inc., 5 Cir. 1962, 305 F. 2d 647. A full trial on the merits is necessary to determine the respective rights of the parties. We express no opinion now as to the facts, beyond stating that they are vigorously disputed between the involved parties.

APPENDIX E

Minute Entry
March 18, 1965
AINSWORTH, J.

No. 13967

CIVIL ACTION

DIVISION D

JAMES A. DOMBROWSKI, *et al.*,

versus

COLONEL THOMAS D. BURBANK, *et al.*

This matter came on for hearing on a former day on motions of defendant, James H. Pfister, to dismiss the complaint against him and for summary judgment in his favor and, alternatively, for an order as authorized by 28 U. S. C. § 1292(b).

The Court, having heard the argument of counsel and having considered the affidavits, deposition and briefs in support thereof and opposed thereto, is now ready to rule.

IT IS ORDERED that the motions of defendant, James H. Pfister, to dismiss the complaint against him and for summary judgment in his favor be, and the same are hereby, DENIED.

IT IS FURTHER ORDERED that the alternative motion for an order as authorized by 28 U. S. C. § 1292(b) be, and the same is hereby, GRANTED.

Appendix E

REASONS

By our minute entry dated April 20, 1964, we denied the motion of defendant, James H. Pfister, to dismiss or, in the alternative, for summary judgment. This motion is a renewal thereof and is denied for substantially the same reasons as are contained in our former ruling. There is no disagreement between the Court and mover as to the law of the case. It is found in *Tenney* v. *Brandhove*, 341 U. S. 367, 71 S. Ct. 783 (1951), where the Court held that a member of a State legislature was entitled to immunity from suit for damages, under the particular facts there submitted. The Supreme Court in *Tenney* said:

> "The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive. The present case does not present such a situation."

As we said in our prior decision, *Tenney* was decided by the Court upon the state of facts which it found, that is, that the complained of acts of the legislator were deemed to be fairly within the province of the Committee's inquiry and, therefore, immune to suit for damages. Here that question is disputed in the most vigorous manner by opposing affidavits submitted by the plaintiff and the deposition of defendant Pfister. In *Norton* v. *McShane*, 5 Cir., 1964, 332 F. 2d 855, the Court granted immunity to certain federal officials growing out of the Ole Miss confrontation because the affidavits submitted by respondents were uncontroverted. That is not true here. Not only are they controverted, but the credibility of the statements of defendant Pfister is also contested by plaintiff. As was said in plain-

tiff's memorandum in opposition to the present motions, "This overlooks the significant fact that whereas the affidavits of third party defendants are not controverted, the affidavit of defendant Pfister concerning his lack of participation in the tortious acts complained of *is very much controverted* by his own public statements on the date of the raid, October 4, 1963, to public, press, radio and T.V." Then plaintiff refers to his own affidavit filed herein in March, 1964, in which he attached a transcript of an interview of Mr. Pfister over New Orleans Station WDSU-TV and in which plaintiff alleges that Mr. Pfister made the following statement:

> "Today's operation has been done jointly by the Louisiana State Police and the New Orleans Police Department at our request. This has been a combined operation of substantial complexity and we are very much in debt to these fine police agencies for their splendid work and their splendid cooperation. We particularly commend them for the very efficient and professional manner in which they have handled the mechanics of their raid and the delicate problems arising therefrom. Today's raids have been on the offices and homes of certain key figures and key officers and members of the Southern Conference Educational Fund who have been actively, and probably under Louisiana statutes, illegally, operating a Communist front organization here in the City of New Orleans. The evidence seized in the raids may be subpoenaed by our committee. The federal authorities have taken no official action against this Communist front group despite two separate Congressional committee hearings on its activities. It appears that there is a definite need for legislative action on the state level to cope with such organizations. The Southern Conference Edu-

cational Fund has been operating openly in New Orleans for many years to the intense disgust of most decent citizens who know what the organization really is. Under the guise and the sham of the racial issue, many good and well meaning people have been duped into supporting this Communist-led group. It appears that a substantial amount of material has been obtained. It will take some time for it to be carefully evaluated. The committee plans to hold open hearings on this subject matter in the future. Our committee counsel, Jack N. Rogers, and our committee staff director, Col. Frederick C. Alexander, Jr., both of Baton Rouge, deserve much credit for the extensive investigation and the very intensive planning which necessarily preceded this operation. All of the members of our committee have unanimously concurred in the operation which took place today."

In plaintiff's memorandum of March 1, 1965, he said:

> "In addition, a deposition of Judge Thomas Brahney, recently dismissed by Pfister as a third party defendant, likewise *tends to cast some doubt* on Mr. Pfister's allegation that he knew nothing of the raid prior to the occurrence."

It is clear that plaintiff is attacking the credibility of Mr. Pfister. Whether he has a right to do so can only be determined after a trial of this material issue which is so strongly contested between these two parties. We are unable to do so on the motions before us because a trial court should not on a motion for summary judgment attempt to determine questions of credibility. *Girard* v. *Gill,* 4 Cir., 1958, 261 F. 2d 695; *Blenke Brothers Co.* v. *Ford Motor Company,* D. C., N. D. Ind., 1963, 217 F. Supp. 459; *Holdeen* v. *United States,* D. C., S. D. N. Y., 1960, 186

F. Supp. 76; *Buren* v. *Schein*, D. C., E D. N. Y., 1963, 32 F. R. D. 218; and summary judgment is usually not possible in a conspiracy case such as is alleged here. *Deterjet Corp.* v. *United Aircraft Corp.*, D. C., D. Del., 1962, 211 F. Supp. 348. A summary judgment should only be given when it is quite clear what the truth is, *Koepfle* v. *Garavaglia*, 6 Cir., 1952, 200 F. 2d 191, and should never be entered except where the defendant is entitled to its allowance *beyond all doubt*. *Mitchell* v. *Pilgrim Holiness Church Corp.*, 7 Cir., 1954, 210 F. 2d 879. In passing upon such a motion it is no part of the Court's function to decide issues of fact but solely to determine whether there are issues of fact to be tried. *Hoffman* v. *Babbitt Bros. Trading Co.*, 9 Cir., 1953, 203 F. 2d 636. The standard in passing on a motion for summary judgment is *strict* and it should be granted only when it is *perfectly clear* that no issue of fact is involved. *Clarke* v. *Montgomery Ward & Company*, 4 Cir., 1962, 298 F. 2d 346. It is an *extreme remedy* and should be granted only when the facts are quite clear and any doubt must be resolved against movant. *Gunther* v. *San Diego & Arizona Eastern Railway Co.*, D. C., S. D. Cal., 1961, 192 F. Supp. 882. Where there is the *slightest* doubt as to the facts, the motion should be denied. *Dale Hilton, Inc.* v. *Triangle Publications, Inc.*, D. C., S. D. N. Y., 1961, 27 F. R. D. 468. In order for the Court to issue a summary judgment there must be no disputed questions of fact or conflicting inferences to be drawn from undisputed facts which, if settled against the moving party, would allow the plaintiff to recover. *Sheets* v. *Burman*, 5 Cir., 1963, 322 F. 2d 277.

We emphasize that what we say here and what was said in our April 20, 1964 minute entry evidences no opinion by the Court as to the facts involved. The facts are material, however, and though the determination as set forth in *Tenney* is narrow because the issue is whether the com-

plained of acts of defendant Pfister may fairly be deemed within the province of the Legislative Committee's inquiry and it must be obvious that there was a usurpation of functions, the present state of the record leaves us no alternative but to deny the motion for summary judgment.

The alternative motion for an order under 28 U.S.C. § 1292(b) is more complicated. Respondent argues that he has an *absolute* immunity under the *Tenney* rule from a suit for damages for acts done in his capacity as a State legislator because he contends that his deposition and the affidavits show that the complained of acts should "fairly be deemed within the province" of the Legislative Committee's inquiry, of which he was Chairman; and as was said in *McShane,* he was acting within the "outer perimeter" of his line of duty as Chairman of the Legislative Committee. We do not read *Tenney* as granting an absolute immunity from all acts of a State legislator. It is our belief that the law of the *Tenney* case requires an examination of the facts to see if the legislator's acts may "fairly be deemed within the province" of legislative activity. Respondent reads *McShane* also as granting immunity because respondent contends that the deposition and affidavits conclusively show that his acts as a State legislator were within the "outer perimeter" of his line of duty as Chairman of the Legislative Committee. There is involved, therefore, a controlling question of law as to whether there is an absolute legislative immunity under the circumstances here. The difficulty is that the circumstances are disputed and we do not think it possible to resolve them without a trial on the merits. However, the record indicates that respondent Pfister will appeal from our recent dismissal of his third-party complaint against his co-legislator members of the Legislative Committee. We signed a final judgment in that matter pursuant to Rule 54(b), and the judgment is appealable. In the interest of judicial economy we have granted an order for an interlocutory appeal here in order

that the question of law contended for by respondent Pfister may be determined. However, by doing so we do not in any way change our belief that summary judgment is not possible under the circumstances of the record here. A consideration of the appeal from our judgment dismissing Pfister's third-party complaint against his co-legislators will necessarily involve the same issue of law as was raised on the present motions. Thus the granting of an immediate appeal from our present order may materially advance the ultimate termination of the litigation.

SUPREME COURT, U. S.

NOV 30 1966

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1966

No. 118

JAMES A. DOMBROWSKI and SOUTHERN CONFERENCE EDUCATIONAL FUND, INC.,

Petitioners,

against

SENATOR JAMES EASTLAND, individually and as Chairman of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate; J. G. SOURWINE, individually and as Committee counsel for the Internal Security Subcommittee of the Judiciary Committee of the United States Senate,

Respondents.

BRIEF FOR PETITIONERS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARTHUR KINOY,
WILLIAM M. KUNSTLER,
511 Fifth Avenue,
New York, New York,

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New Orleans, Louisiana,

Attorneys for Petitioners.

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Supreme Court of the United States

October Term, 1966

No. 118

JAMES A. DOMBROWSKI and SOUTHERN CONFERENCE EDUCATIONAL FUND, INC.,

Petitioners,

against

SENATOR JAMES EASTLAND, individually and as Chairman of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate; J. G. SOURWINE, individually and as Committee counsel for the Internal Security Subcommittee of the Judiciary Committee of the United States Senate,

Respondents.

BRIEF FOR PETITIONERS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Opinions Below

The Court of Appeals for the District of Columbia Circuit affirmed the orders of the District Court in a *per curiam* opinion in which only two Circuit Judges joined. (Circuit Judges Burger and McGowan joined in the opinion. Senior Circuit Judge Washington did not participate in the decision.) The *per curiam* opinion is reported at 358 F. 2d 821 (App. D. C. 1966) (R. 100-109).

The District Court opinion by District Judge Holtzoff, dismissing so much of the complaint as sought injunctive relief, is not yet reported (R. 12-14). No opinion was filed by District Judge Sirica in granting respondents' motion for summary judgment in the cause of action for money damages.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on February 4, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). A petition for writ of certiorari was filed with this Court on May 5, 1966, and an order allowing certiorari was entered by the Court on October 10, 1966.

Constitutional and Statutory Provisions Involved

The principal constitutional and statutory provisions involved are the First, Fourth and Fourteenth Amendments to the Constitution of the United States, Article I, Section 6 of the Constitution of the United States (the "speech or debate" clause), and Title 42 U.S.C. 1983 and 1985. The relevant portions of these provisions are set forth in Appendix A to this Brief.

Questions Presented

1. Whether the Speech or Debate Clause immunizes a Senator and a Senate employee from liability in a suit for money damages under the Civil Rights Act where the complaint charges that they participated in a conspiracy together with officials of the State of Louisiana under color of unconstitutional laws of that state to instigate and contrive illegal raids, arrests, searches and seizures, in violation of the Fourth Amendment, for the purpose of

intimidating and deterring citizens from exercising fundamental First Amendment rights of speech, press and association in their efforts to implement the Fourteenth Amendment guarantees of Negro equality and freedom?

2. Whether summary judgment for such respondents is proper in a cause of action for money damages under the Civil Rights Act where the lower court concedes that in the record there are disputed issues of fact as to whether the respondents were parties to a knowing concert of action with the state officials requiring exploration and resolution by means of a trial?

3. Whether the judicially developed doctrine of official immunity enunciated by the Court in *Barr* v. *Matteo* may be extended to cover legislative employees?

4. Whether if so, such a doctrine immunizes an employee of the legislature from a suit for money damages under the Civil Rights Act where the complaint charges that he participated in a conspiracy together with officials of the State of Louisiana, under color of unconstitutional laws of that State, to instigate and contrive illegal raids, arrests, searches and seizures, in violation of the Fourth Amendment, for the purpose of intimidating and deterring citizens from exercising fundamental First Amendment rights of speech, press and association in their efforts to implement the Fourteenth Amendment guarantees of Negro equality and freedom?

5. Whether the request for equitable relief restraining the individual respondents from using or disposing of the records illegally obtained by them as a result of their participation in the charged conspiracy should have been dismissed without a hearing on the unilateral assertion of respondents that it would be futile for the court to grant the relief sought?

Statement of the Case

The writ of certiorari brings up for review a judgment and *per curiam* opinion of the Court of Appeals for the District of Columbia Circuit affirming (1) an order of the District Court dismissing petitioners' cause of action for equitable relief and (2) an order of the District Court granting respondents' motion for summary judgment as to petitioners' cause of action for money damages.

A. Statement of Facts

1. The facts preceding the institution of the present complaint for injunctive relief and money damages.

The case brings to the Court questions arising out of the same factual context of illegal arrests and raids undertaken under color of certain Louisiana state statutes which were the occasion of the Court's examination in the October 1964 Term in *Dombrowski* v. *Pfister,* 380 US 479.

The petitioners here, Dr. James A. Dombrowski and the Southern Conference Educational Fund, Inc., were the successful appellants in *Dombrowski* v. *Pfister, supra.*

Petitioner Southern Conference Educational Fund, Inc., hereafter referred to as "SCEF", is a non-profit membership corporation organized under the laws of the State of Tennessee and maintains an office in the State of Louisiana (R. 2). The purpose and function of SCEF as an association, as alleged in the complaint, is to attempt to secure to Negro citizens the rights guaranteed to them under the federal Constitution and to participate in efforts to end all forms of segregation in the Southern states (R. 2). See *Dombrowski* v. *Pfister, supra,* at p. 482. Petitioner Dr. James A. Dombrowski was then the Executive Director of SCEF and was a citizen of the State of Louisiana and the United States (R. 2, 20).

Respondent Eastland is a Senator from the State of Mississippi and the Chairman of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate. Respondent Sourwine is the Chief Counsel of the Internal Security Subcommittee of the Senate (R. 3).

During the summer and early fall of 1963, just prior to the October raids, certain private discussions were held between respondent Sourwine and one Jack N. Rogers, who was counsel to the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, concerning the records and files of petitioner SCEF.[1] It appears that on or about July 17, 1963 respondent Sourwine had a meeting with Rogers at which Rogers informed the respondent that the Louisiana Committee was contemplating obtaining the records and files of SCEF. Rogers told Sourwine that he would let him know promptly if they did obtain the records, and if they seemed of interest to the respondent (Rogers Affidavit, R. 71, Sourwine Affidavit, R. 40). About "the middle of September" 1963 (R. 71), another private discussion about the SCEF records was held between respondents Sourwine and Rogers. Rogers telephoned respondent Sourwine and asked him whether, if the Joint Committee obtained the records, the respondent and one Mandel, another employee of the Senate Committee, could come down to Louisiana and help "evaluate the

[1] All of the facts set forth here as facts are uncontested. They are taken in large measure, as indicated, from respondents' own affidavits or depositions or from relevant court opinions and findings. The Court of Appeals rejected respondents' contention that petitioners had failed to put forward a serious claim that respondents were parties to a knowing concert of action with the state officials holding that "were only the former involved we might have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial" (R. 105). However the Court of Appeals based its affirmance of the summary judgment order solely on the finding that the doctrine of legislative immunity insulated both respondents from suit (R. 105).

material'' (Rogers Affidavit, R. 71, Sourwine Affidavit, R. 40).[2] Respondent Sourwine then discussed the content of his mid-September talk with respondent Eastland (Sourwine Affidavit, R. 40).

Respondents' own proof next shows that sometime either before or after the mid-September discussion with respondent Sourwine, but in any event prior to September 20, it was concluded that the method of seizure of the SCEF records ought to be through the utilization of the criminal provisions of the Louisiana anti-subversive laws rather than by direct subpoena by the Louisiana Legislative Committee (Rogers Affidavit, R. 71).[3] Accordingly, Rogers

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[2] Respondent Sourwine places the second discussion about the SCEF records "sometime later, in August or September, 1963" (R. 40). Rogers places it "about the middle of September, 1963" (R. 71).

[3] Actually, the companion litigation in the Louisiana federal courts, *Dombrowski* v. *Burbank*, see *infra*, at p. 11, has revealed that Rogers and the Louisiana Joint Committee first developed the plan to utilize the police procedures to undertake the raids and seizures as early as August 27th, several weeks *before* the "mid-September" conference of Rogers and respondent Sourwine. Thus Colonel Alexander, the staff director of the Joint Committee, stated as follows in an affidavit submitted in the Louisiana federal action:

> "On August 27, 1963, at a full meeting of the Committee, Affiant briefed the Committee completely on the progress of the investigation which had begun and which had been named 'Operation Tip-Top'. At this Committee meeting Affiant was authorized by the Committee to contact officials of the New Orleans Police Department and fully brief them and to enlist their assistance."

The Alexander affidavit affixed a copy of the "official minutes" of the Committee meeting. These minutes of the August 27, 1963, meeting stated, in part:

> "Col. Alexander briefed the Committee completely on the progress to date of Operation Tip-Top and asked the Committee's permission to brief Chief of Police Giarrusso of New Orleans and Major Trosclair of the New Orleans Police Department on the operation with the intention of enlisting their assistance since the operation would fall under the jurisdiction of the New Orleans Police force."

The Alexander affidavit and attachments are in the court files in *Dombrowski* v. *Burbank* and are reproduced here at Appendix F

advised the Joint Committee that the operations of petitioner SCEF "were in violation of the Louisiana criminal statutes dealing with subversive activities" (R. 71). The Joint Committee concurred in this and "directed" Rogers to "take the matter up with the Louisiana State Police" (R. 71). On or about September 20, 1963, Rogers met with the Louisiana Superintendent of Police and "requested that he have the State Police obtain and execute search warrants for the offices of the SCEF and the premises occupied by James A. Dombrowski and certain other officers of the SCEF" (Rogers Affidavit, R. 72). Rogers testified in his affidavit that "I offered to assist the police in obtaining the warrants, and my offer was accepted" (R. 72). On October 2, 1963, Rogers and a Louisiana police officer swore to applications for search warrants and arrest warrants under the Louisiana "anti-subversive" statutes, and the warrants were issued (R. 72).

On the afternoon of October 4, 1963, certain police officials of the Police Department of the City of New Orleans, Louisiana, officers of the Louisiana State Police and Mr. Rogers, representing the Joint Legislative Committee on Un-American Activities of the Louisiana Legislature, broke into and forcibly entered the office of SCEF in the City of New Orleans and proceeded to seize the entire contents of the office including the books and records of the organization, its ledgers, receipts, memoranda, membership lists, lists of contributors, vouchers, pamphlets and literature, together with many items of personal property belonging to Dr. Dombrowski. The office was totally ransacked and everything movable taken out (R. 4, 5, 21, 23, 24, 25). Dr. Dombrowski was placed under arrest and booked for violation of Louisiana Revised Statutes 14:358 et seq. and 14:390 et seq., known as the Louisiana Anti-Subversive Laws (R. 19).[4] The same day officers of the

[4] The provisions of the Louisiana law under which Dr. Dombrowski was arrested were later stricken as facially unconstitutional by this Court in *Dombrowski* v. *Pfister, supra.*

New Orleans Police Department of the State Police and Mr. Rogers, again representing the Louisiana Joint Legislative Committee, proceeded to search the residence of Dr. Dombrowski in the City of New Orleans and seized many items of personal property from his house and from his automobile located nearby (R. 22).

The circumstances of the arrests and raids were detailed by this Court in the *Dombrowski* opinion. In footnote four, 380 US 479 at 480, the Court stated that the circumstances of the arrests were set forth in this descriptive passage from Judge Wisdom's dissenting opinion in the three-judge court, 227 F. Supp. at 573:

> "At gunpoint their homes and offices were raided and ransacked by police officers and trustees from the House of Detention acting under the direct supervision of the staff director and the counsel for the State Un-American Activities Committee. The home and office of the director of the Southern Conference Educational Fund were also raided. Among the dangerous articles removed was Thoreau's *Journal*. A truckload of files, membership lists, subscription lists to SCEF's newspaper, correspondence, and records were removed from SCEF's office, destroying its capacity to function. At the time of the arrests, Mr. Pfister, Chairman of the Committee, announced to the press that the raids and arrest resulted from 'racial agitation.'"

The raids of October 4 and the arrest of Dr. Dombrowski were conducted purportedly under the authority of the search warrants and arrest warrants sworn out on October 2. However, at a preliminary hearing held on October 25, a judge of the Criminal District Court for the Parish of Orleans, after taking evidence, summarily discharged the defendants. The state judge held that the arrest warrants were improvidently isued and that there was no reasonable cause for the arrests (R. 19, 20). Moreover, at a later stage in the state criminal proceedings, the

state court granted a motion to suppress the seized evidence on the ground that the raids were illegal, in violation of the Federal Constitution, relying upon this Court's decision in *Mapp* v. *Ohio*, 367 US 643.[5] (The opinion of the state court granting the motion to suppress is set forth in Appendix B.) Consequently, under rulings of the Louisiana state courts both the arrests and the raids were wholly illegal. As this Court pointed out in *Dombrowski*, "Later in October a state judge quashed the arrest warrants as not based on probable cause, and discharged the appellants. Subsequently, the court granted a motion to suppress the seized evidence on the ground that the raid was illegal." 380 US at p. 488.[6]

However, despite the ruling of the state court on October 25, that the arrest warrants were illegal and issued without probable cause, the books, records, documents, membership lists and other articles which had been seized during the illegal raids were not then returned to the petitioners. They had been secretly and without petitioners' knowledge, transferred from the control of the police to the possession of respondents Sourwine and Eastland.

Although none of these facts were known at the time either to petitioners or the public, what had happened to the records during the illegal raids of October 4, emerged during the subsequent litigation.

At the time of the seizure of the records by the police on October 4, Rogers then and there served on the police

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[5] The motion to suppress was made after indictments were returned following the dissolution of Judge Wisdom's temporary restraining order by the majority of the three-judge court. See 380 US at 484.

[6] The illegality of the raids was further underscored by the decision of this Court in *Dombrowski* directing that on remand the decree of the three-judge court shall include an order directing the "immediate return of all papers and documents seized." 380 US at p. 497.

officer in charge, a Major Willie, a Joint-Committee subpoena duces tecum requiring "forthwith" production of everything seized by the police (Rogers Affidavit, R. 72). The seized materials, however, remained in possession of the state police who took them that evening to Baton Rouge (R. 72). At 10:30 P. M. that evening, October 4, Rogers then telephoned respondent Sourwine at his Washington home and informed him of the seizures of the SCEF records. Rogers told Sourwine that the Louisiana State Committee had obtained "all of the records and files" of SCEF (R. 48), and urged him to come down to Louisiana "as soon as possible" (Rogers Affidavit, R. 73, Sourwine Affidavit, R. 40). Respondent Sourwine left Washington at 8:20 A. M. and appeared in Baton Rouge at 11:00 A. M. (Sourwine Affidavit, R. 41). He had in his possession several blank subpoenas signed by respondent Eastland (R. 32). Apparently respondent Sourwine had access to a "folder which contains a number of subpoenas signed by the Senator in blank" (R. 32). After discussing the nature of the seized materials with Rogers (R. 41), Sourwine had a telephone conversation with respondent Eastland (R. 41). He then had the blank subpoenas filled out in Baton Rouge by a typist who was Mr. Rogers' secretary (R. 32) [7] and served them on Rogers the same morning. Although the respondents maintain that the blank subpoenas were filled in on the morning of October 5, the subpoenas on their face were dated October 4, the day of the raids (R. 32, 33).[8] The superintendent of the Louisiana Police was then "appointed" on the same day "custodian" of these records and documents by respondent Sourwine (R. 41). However, the physical location of the records and other material remained in Baton Rouge physically under the control of the state officials (R. 72).

Respondent Sourwine later testified that the issuance of the blank subpoenas dated October 4 was never authorized

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[7] These facts come from the pre-trial deposition of respondent Sourwine, excerpts of which are in the printed record.

[8] The respondents maintain that this was a "stenographic error" (R. 33, R. 41).

by the Internal Security Subcommittee of the Senate, and that these subpoenas were not authorized by either the Committee or the Subcommittee (R. 34). The respondents have conceded in this Court that these subpoenas were not authorized by either the Committee or the Subcommittee. Respondents' Brief in Opposition to Petition for Writ of Certiorari, p. 8.

2. The Institution of the First Action.

These relations between the respondents and the Louisiana officials on the evening of the raids and the next morning were wholly unknown to the petitioners until the day of the preliminary hearing in the state court on October 25, when the Louisiana officials informed the state court that they could not comply with any order to return the documents and membership lists seized during the illegal arrests since they were technically in the custody of the respondents Sourwine and Eastland although physically still in the possession of state officials (R. 28). Until that moment respondents' participation in the events of October 4 and 5 had been completely unknown to petitioners or to the press or public.

Immediately after the ruling of the state court on October 25, voiding the warrants of arrest and upon the disclosure of respondents' role in the seizure of the records, petitioners instituted in the United States District Court for the Eastern District of Louisiana, New Orleans Division, a federal plenary action under the Civil Rights Act and the Constitution, seeking injunctive relief and money damages. The action is referred to hereafter as the first action.[9]

Petitioners joined, as defendants in the first action, the Louisiana state officials involved in the raids together with respondent Eastland, charging a conspiracy under the color of Louisiana state law to deprive petitioner of

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[9] This action was entitled *Dombrowski* v. *Burbank*, #13,967, in the Eastern District of Louisiana, New Orleans Division.

rights, privileges and immunities granted to them as citizens of the United States by the laws and Constitution of the United States. The complaint was filed on the morning of October 27 (R. 29). A motion for a temporary restraining order restraining the defendants from removing any of the seized documents, records and other articles from their location in Baton Rouge, and from delivering them, or surrendering them in any way to respondent Eastland, was immediately presented to Federal District Judge Ainsworth (now Circuit Judge) (R. 29). Petitioners were notified by the Clerk of the Court that Judge Ainsworth had been assured by representatives of the State that the seized material was still at the State Police Headquarters in Baton Rouge (R. 29). Judge Ainsworth accordingly directed that the motion be returnable before him Monday morning, October 28, in New Orleans and ordered petitioners to notify the defendants in the action that the restraining order would be heard in the District Court that Monday morning (R. 29). Accordingly, petitioners sent respondent Eastland the following telegram (R. 29):

> "Federal Judge Robert Ainsworth has requested your presence in his office 9:30 A. M., October 28th, to discuss an injunction enjoining turning over SCEF and Smith and Waltzer records to Senator Eastland." (R. 54)

What followed that evening is unchallenged on the record.

The uncontested facts are that on Sunday evening, October 28, respondent Eastland notified respondent Sourwine by telephone of the receipt of this telegram and directed respondent Sourwine to telephone Baton Rouge at once and arrange to have all the records, documents, membership lists and other materials transferred that night out of the State of Louisiana (R. 55).

When it appeared that hiring a truck might be difficult at that time of night, respondent Eastland told Sourwine to "get them started" (R. 55), and "get them over to Woodville [Mississippi], and, if necessary, you can leave them with the Chancery Clerk there, and then have the

Committee boys pick them up and take them on from there" (R. 55). This was already "fairly late in the evening" (R. 56).

At about 10 P.M. Sourwine telephoned Rogers and told him he had been trying unsuccessfully to reach Colonel Burbank, the Superintendent of the Louisiana Police, and asked Rogers to give Burbank Senator Eastland's instructions to move all the SCEF material that night out of Louisiana and over to Woodville, Mississippi (R. 73-74). Rogers then immediately conveyed Senator Eastland's instructions to Colonel Burbank (R. 74). At 11:43 P.M. respondent Sourwine confirmed these instructions to immediately transport the SCEF material to Woodville, Mississippi, in a telegram he dictated over the telephone to Colonel Burbank (R. 56).

As a result of these directions of the respondents, at about midnight Sunday night a vanload of material containing the SCEF records and documents was moved over the Louisiana state border to Woodville, Mississippi, and was deposited with the clerk of the Chancery Court in Woodville, Mississippi (R. 29, 58).[10] This midnight removal

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[10] Respondent Sourwine offered an interesting suggestion in his deposition as to certain of the possible reasons for the sudden removal of the seized SCEF records from the State of Louisiana late that Sunday night.

> "Q. Was it your understanding that there was any connection between the request for injunction and the sudden removal of the documents from the State of Louisiana? A. I did not know about a request for an injunction, sir, but certainly I had in my mind—and I imagine Senator Eastland had in his mind—the fact that if there was to be litigation about the documents, nobody should be dragged into it and involved in it except the Committee and the Committee personnel, and that the documents should be taken out of the possession of a custodian who held an official position with the State and might, because he wore [fol. 63] two hats, one as head of the State Police and one as custodian for us, become involved in an awkward situation.
>
> "Now I did not discuss this with Senator Eastland, but I admit that I did have that possibility in mind." (R. 57)

of the SCEF records out of Louisiana into Mississippi was not authorized by or in fact known to the other members of the Senate Subcommittee (R. 57), and the respondents have conceded in this Court that the "removal of that property [petitioners' seized records] from Louisiana to Washington —had not been authorized by the Subcommittee prior to the actions taken by respondents." Respondents' Brief in Opposition to Petition for Writ of Certiorari, p. 8.[11]

On Monday morning, October 28, the return day of the motion for a temporary restraining order, petitioners' attorneys were advised that the defendants could not appear at 9:00 A. M. before Judge Ainsworth as originally scheduled (R. 29). At 12:00 noon attorneys for the Louisiana defendants in the first action appeared in the office of Judge Ainsworth and informed the court and petitioners' attorneys that since all of the records and materials seized in the raids had been removed from the State of Louisiana and had been delivered to the Chancery Clerk in Woodville, Mississippi, the records were no longer in the jurisdiction of the Federal District Court and the request for temporary restraining order was moot (R. 29).[12]

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[11] While the respondents concede in this Court that the "subpoena directed to petitioners' property—and the removal of that property from Louisiana to Washington—had not been authorized by the Subcommittee prior to the actions taken by respondents" Brief of Respondents, *supra*, at p. 8, they point to a subsequent resolution of the Subcommittee on November 14, 1963, "incorporating the seized records into its hearing record", *supra* at p. 8. The resolution of November 14, does not purport on its face to retroactively authorize either the subpoenas or the sudden midnight removal of the seized materials. See Resolution of November 14 (R. 36). Nor would any such retroactive authorization be effective. *Cf. Gojack* v. *United States*, 384 US 702, 86 S. Ct. 1689, 1697, fn. 12; *United States* v. *Rumley*, 345 US 41, 48. See discussion *infra* at pp. 74 *et seq.* See also Senator Keating's objection to the November 14 Resolution itself (R. 30-31).

[12] The first action has continued in active litigation in the Eastern District of Louisiana in respect to the cause of action for money damages. See discussion *infra* at p. 19.

3. The Institution of the Second Action and the Filing of the Present Complaint.

Immediately thereafter petitioners filed the present complaint in the United States District Court for the District of Columbia, the residence of respondents Sourwine and Eastland.

The present complaint (R. 2-12) paralleled almost identically the basic allegations of the complaint filed in the Eastern District of Louisiana in the first action. The present complaint alleged that the defendants, Thomas D. Burbank, Russell R. Willie, James H. Pfister, all Louisiana state officials, and respondents Eastland and Sourwine, entered into a plan, agreement and conspiracy, under the color of Louisiana state laws and statutes, to deprive the petitioners of rights, privileges and immunities granted to them as citizens of the United States under the laws and Constitution of the United States and in particular the First, Fourth and Fourteenth Amendments (R. 4). The complaint alleged that pursuant to this conspiracy the defendants, under the color of certain Louisiana state statutes, planned and carried through illegal raids of the petitioners' homes and offices, as well as causing the illegal arrest of petitioner Dombrowski, all in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States (R. 5, 6, 7).

The complaint further alleged that the defendants conspired, under the color of the Louisiana state statutes, through these illegal raids, to seize books, records, lists of members, contributors and friends of petitioner SCEF who were engaged in efforts throughout the state of the South to implement the Equal Protection Clause of the Fourteenth Amendment (R. 9). The complaint further alleged that these activities of the defendants were for the purpose of harassing, intimidating and deterring the petitioners, their friends, members and supporters from exercising federally-protected constitutional rights (R. 9). The complaint further alleged that the illegal actions of the

defendants, under color of the Louisiana state statutes, has resulted in serious damage to the plaintiffs (R. 9).

The complaint further alleged that one of the central purposes of the conspiracy was to obtain possession of the membership lists of the petitioner SCEF, a civil rights organization (R. 7).[13] The complaint charged that the respondents, together with the Louisiana state officials, sought to utilize the Louisiana laws as a pretext for the illegal raids and seizures in order to obtain the lists, which they could not have otherwise obtained through lawful legislative process (R. 9).

The complaint sought money damages in the amount of $250,000 for each plaintiff (R. 11) as well as appropriate injunctive relief (R. 10, 11).

B. Proceedings Below

1. Proceedings in the District Court for the District of Columbia.

After the filing and serving of the complaint upon those defendants who were Washington, D. C. residents, respondents Eastland and Sourwine,[14] a motion for a preliminary injunction came before the District Court for the District of Columbia on December 18, 1963 (R. 34). Although petitioners sought to withdraw the motion temporarily in order to take the deposition of a respondent in support of the request for injunctive relief (R. 12; 13), the District Court, by Judge Holtzoff, entered an order from the bench dismissing

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[13] Since the decision of this Court in *NAACP* v. *Alabama*, 357 US 449, it has become increasingly clear that the enforced production of membership lists of organizations actively seeking enforcement of the Equal Protection Clause in the Southern states itself violates the Constitution, 357 US at p. 462; see also *NAACP* v. *Flowers*, 377 US 288; *Louisiana* v. *NAACP*, 366 US 293.

[14] Service was never effected in this action upon the Louisiana defendants. Similarly, service was not effected upon Eastland as a defendant in the first action in the Eastern District of Louisiana.

so much of petitioners' complaint as sought injunctive relief against the defendants (R. 14, 15). Judge Holtzoff delivered an oral opinion in support of his conclusions that the granting of injunctive relief would "contravene the constitutional requirement of separation of powers and would exceed the jurisdiction of this Court" (R. 15). Notice of appeal was duly filed from this order. The order of Judge Holtzoff left undisturbed so much of the complaint as set forth a cause of action for money damages against respondents.

Pursuant to the Federal Rules of Civil Procedure a deposition of respondent Sourwine was taken by petitioners. Subsequent to this, a deposition of Walter Dillon, Esq., one of the attorneys for the petitioners, was taken by the respondents. Both of these depositions are part of the files of the case. Portions of the deposition of respondent Sourwine are printed as part of the Record in this Court (R. 32-34, 44-60).

Immediately subsequent to the taking of these depositions, respondents moved to dismiss the complaint, or in the alternative, for summary judgment (R. 15-17). Identical motions were made in the first action in the Federal District Court in Louisiana by the Louisiana state defendants. Affidavits were filed in both actions in support of the motion and in opposition.[15]

On March 12, 1964, the District of Columbia District Court, by Judge Sirica, granted the motion for summary

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[15] Subsequent to the filing of these affidavits but prior to the hearing on respondents' motion, petitioners filed affidavits of counsel seeking to invoke Rule 56, Subdivision (f) of the Federal Rules of Civil Procedure, which would permit the Court on a motion for summary judgment to grant a continuance "to permit affidavits to be obtained or depositions to be taken or discovery to be had" (R. 30-31). These affidavits of counsel set forth certain questions of fact which were discovered after respondents' motion, which indicated the existence of additional serious and sharply disputed material issues of fact which would have required the denial of a motion for summary judgment. See discussion, *infra*, at p. 74.

judgment in respect to the cause of action for damages (R. 17). No opinion was filed. A notice of appeal was duly filed from the order of the District Court granting summary judgment (R. 17-18). A subsequent order of the Court of Appeals consolidated the appeals from the first order dismissing the complaint insofar as it prayed for injunctive relief and the second order granting summary judgment on the cause of action for damages.

2. Proceedings in the Court of Appeals for the District of Columbia.

The Court of Appeals, in a *per curiam* opinion in which the Senior Circuit Judge Washington did not participate, affirmed the orders of the District Court.

In respect to the dismissal of the request for injunctive relief, the Court held that the relief sought was properly denied on the limited ground that an equitable decree against respondents Eastland and Sourwine restraining their use of the illegally seized material and requiring its return would not be effective or of any benefit to petitioners since the seized materials appeared to be in the possession of the Subcommittee itself (R. 104-105).

In respect to the cause of action for money damages, the respondents had urged two positions in the Court of Appeals: "(1) that appellants [petitioners] failed to put forward a serious claim that appellees [respondents] were parties to a knowing concert of action with the state officials, and (2) in any event the doctrine of legislative immunity insulated both appellees [respondents] from suit." (See *per curiam* opinion of Court of Appeals, R. 105). The Court of Appeals, rejecting the first contention, pointed out that "were only the former involved we might have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial." (R. 105). However, the Court of Appeals based its affirmance solely upon an assumption that nevertheless the doctrine of legislative immunity

wholly insulates the respondents from this damage action, resting upon this Court's decisions in *Tenney* v. *Brandhove,* 341 U. S. 367 (1951); *Barr* v. *Matteo,* 360 U. S. 564 (1959).

3. Proceedings in the First Action in the Eastern District of Louisiana and in the Court of Appeals for the Fifth Circuit.

Simultaneous with the motion made in this action in the District Court, the Louisiana state officials, defendants in the first action, made identical motions on identical grounds, before District Judge Ainsworth in the Eastern District of Louisiana. On March 18, 1964, Judge Ainsworth denied such a motion of James Pfister, a member of the Louisiana legislature, and the Chairman of the Joint Legislative Committee, for summary judgment in the cause of action for money damages. Pfister had urged, in identical terms as respondents here, that he was entitled to absolute legislative immunity under the doctrine of this Court in *Tenney* v. *Brandhove, supra.* Judge Ainsworth denied Chairman Pfister's motion for summary judgment holding that "there is a sharp dispute as to the facts upon which we can conclude whether or not the defendant was engaged in permissible legislative activity on the dates he is alleged to have committed tortious acts against plaintiff." (This opinion is set forth in Appendix C.) Accordingly, Judge Ainsworth concluded that the opinion of this Court in *Tenney* did not require summary dismissal of the cause of action for money damages.[16]

In March, 1965, Chairman Pfister renewed his motions for summary judgment or for dismissal, and moved in the alternative for an order as authorized by 28 U.S.C. 1292(b)

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[16] In a companion opinion on the same day a similar motion for summary judgment made by another state official, Major Willie, was denied by Judge Ainsworth. A motion by the Superintendent of State Police Burbank for summary judgment was granted, not on immunity grounds, but for failure to present a sufficient case of connection with the charged conspiracy.

to appeal the District Court's denial of his motions to the Court of Appeals. On March 18, 1965, Judge Ainsworth, in a careful opinion, reaffirmed his refusal to grant the motions. The opinion, reproduced here as Appendix D, restated the former conclusion of the District Court—that the illegal acts charged against Chairman Pfister do not necessarily receive an automatic blanket immunity under this Court's decision in *Tenney*.

Judge Ainsworth pointed out that the legal issue as to whether the complained of acts of the defendant were within "the sphere of legitimate legislative activity", *Tenney* v. *Brandhove, supra,* at p. 376, turned upon the defendant's relationship to the tortious acts involved in the illegal raids and seizure. Since this question of Chairman Pfister's relationship to the charged conspiracy to undertake the illegal raids and seizures was disputed on the record and could not be resolved without a trial on the issue, Judge Ainsworth concluded that the intertwined issue of immunity could not be resolved "without a trial on the merits" (Appendix D).

Simultaneous with his effort to renew his motion for summary judgment Chairman Pfister had filed a third-party complaint against the other legislative members of the Louisiana Joint Committee alleging that they were liable to him for all or part of any sum the plaintiffs might recover from him upon the theory that any of his actions giving rise to liability to the plaintiffs were authorized and approved by the entire Committee. The third-party defendants moved to dismiss and for summary judgment, raising the issue of legislative immunity. The district judge, while denying Chairman Pfister's motion for summary judgment (Appendices C and D), granted the third-party defendants' motion for summary judgment. Chairman Pfister appealed this decision to the Court of Appeals for the Fifth Circuit.

On November 14, 1966, the Court of Appeals for the Fifth Circuit (Circuit Judges Brown, Wisdom and Circuit

Judge Burger of the District of Columbia Circuit sitting by designation), in an opinion by Circuit Judge Wisdom reversed the judgment in favor of the third-party defendants, members of the Legislative Committee. *Pfister* v. *Arceneaux*, #22562, Court of Appeals for the Fifth Circuit. (The opinion of the Court of Appeals is reproduced as Appendix E.) The Court of Appeals held that since there was a disputed issue of fact as to whether the committee members were involved in any way in the raids and seizures this "has a serious bearing on the question whether Pfister and the other members of the Committee were 'acting in the sphere of *legitimate* legislative activity' *Tenney* v. *Brandhove*, 1951, 341 U.S. 367, 376, 71 S. Ct. 783, 95 L. Ed. 1019, 1927 [emphasis added] which would entitle them to immunity." Appendix E. Thus the Court of Appeals for the Fifth Circuit concluded that a "genuine issue as to . . . [a] material fact" was created requiring the reversal of the judgment granting the motion for summary judgment. Appendix E.

As a result of these decisions by the Eastern District of Louisiana and the Court of Appeals for the Fifth Circuit, the cause of action for money damages arising out of the illegal raids and seizures in the first action against Chairman Pfister of the Louisiana Joint Committee, the Louisiana police officers involved, and the third-party defendants, members of the Louisiana Joint Committee, will be tried on the merits in the federal District Court for the Eastern District of Louisiana, and is presently on the trial calendar.[17]

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[17] Since Pfister was appealing the dismissal of the third-party complaint in the interest of "judicial economy" Judge Ainsworth granted his request for an order for an interlocutory appeal under 28 U.S.C. 1292(b) from the refusal to grant his motions for summary judgment in the main money damages cause of action. However, the Court of Appeals for the Fifth Circuit thereafter dismissed Chairman Pfister's appeal. *Pfister* v. *Dombrowski*, Misc. #168, 1965, Court of Appeals for the Fifth Circuit (denying leave to take the interlocutory appeal).

These decisions of the Court of Appeals for the Fifth Circuit and the Federal District Court for the Eastern District of Louisiana are in direct and sharp conflict with the decision of the Court of Appeals for the District of Columbia brought here for review by the writ of certiorari. This conflict between the Circuits over the applicability of the doctrine of legislative immunity to civil rights damage actions arising out of the context of events previously considered by this Court in *Dombrowski* v. *Pfister* is grounded in large measure upon a fundamental difference in the interpretation of the Speech or Debate Clause and the controlling decisions of this Court.

Summary of Argument

This case raises a series of issues arising once again out of the factual complex which was before the Court in *Dombrowski* v. *Pfister* in the October, 1964, Term, 380 U.S. 479. Here, again, as in the original *Dombrowski* case, questions arising out of petitioners' effort to seek redress in the national courts for injuries to their fundamental constitutional rights raise considerations of importance not only to the enforcement of laws protecting civil rights but to the very essentials of a judicial system which rests upon the premise that this is a government of law and not men.

I.

Respondents stand charged with participation in a knowing concert of action with state officials under color of state law to engineer illegal raids, seizures and arrests in violation of the Fourth Amendment for the purpose of deterring the petitioners and other citizens from exercising federally secured rights in efforts to implement the constitutional promise of racial equality and justice. The lower court concedes that absent considerations of legislative immunity

the disputed question of respondents' participation in the conspiracy could only be resolved by trial. But the concept of legislative immunity embedded in the Speech or Debate Clause does not immunize the respondents from liability in the cause of action for money damages.

1. The blanket immunity which the lower court throws over the illegal acts of the respondents is not sanctioned by the landmark opinions of this Court interpreting the Speech or Debate Clause. *Tenney* v. *Brandhove,* 341 U.S. 367, refutes the concept that immunity is invoked wherever the legislator utilizes his official position to facilitate or cloak his illegal or criminal activities. *Tenney* emphasizes that the sweep of the constitutional immunity extends only to conduct within "the sphere of legitimate legislative activity". And in *Tenney* the Court warned that boundaries to the immunity will be enforced where acts of legislators outside the sphere of "legitimate legislative activity" violate the rights of private individuals.

Last Term in *United States* v. *Johnson,* 383 U.S. 169, the Court warned against a distortion of the legislative immunity doctrine which would blunt the distinction between "legitimate legislative activity" and unlawful conduct for which a legislator remains accountable at law. *United States* v. *Johnson* stressed that conduct of a legislator such as the participation of these respondents in the charged illegal conspiracy which "is in no wise related to the due functioning of the legislative process" is not reached by the protection of the Speech or Debate Clause. The opinion of the Court in *United States* v. *Johnson* makes it clear that the Clause, designed to protect the free speech of legislators, will not be distorted into an instrument for the destruction of the free speech and liberties of citizens, which it would become if read as a blanket immunity for unlawful acts, unrelated to the due functioning of the legislative process, and destructive of the fundamental rights of the citizens.

The first decision of the Court considering the Clause, *Kilbourn* v. *Thompson,* 103 U.S. 168, made it very clear that careful boundaries must be observed in enforcing the legislative immunity. *Kilbourn* emphasized that there is no legislative immunity for wrongful, illegal or criminal acts which are not those "generally done in a session of the House by one of its members in relation to the business before it." Such an act was the illegal arrest of the plaintiff Kilbourn by the Sergeant-at-Arms of the House. Such an act was the participation by these respondents in the conspiracy to contrive the illegal raids and seizures of October 4.

The guidelines and boundaries to the legislative immunity which emerge out of the decisions of this Court indicate that (1) where the claimed responsibility for a wrongful or illegal act rests *solely* upon legitimate legislative activity such as offering or voting for a resolution on the floor, the Clause will immunize the legislator from liability for the wrongful act; (2) where the cause of action for legal redress rests *in part* upon legitimate legislative activity such as an act of making a speech on the floor, the Clause will require a "purging" of the legal action of "elements offensive to the Clause" but will not immunize the wrongful act or protect the legislator from trial, and (3) where, as here, the cause of action rests *wholly* upon wrongful and illegal conduct which is not "generally done in the House" or is not "legitimate legislative activity", no legislative immunity attaches whatsoever.

2. The English history of the concept of legislative immunity and the ultimate English judicial resolution of the complex and contradictory influences involved in the emergence of the parliamentary privilege are deeply related to the "presuppositions of our political history" essential to an understanding of the meaning and scope of the Speech or Debate Clause. *Tenney* v. *Brandhove,* 341 U.S. at 372.

This rich history reveals that the firm boundaries to the privilege which this Court has recognized from *Kilbourn* to *Johnson* are necessary in order, on the one hand, to preserve the privilege as the bulwark of parliamentary free speech and independence from the executive, and on the other hand to restrict the privilege from becoming a means of perpetuating a legislative tyranny destructive of the rights of individual citizens. The ultimate English judicial resolution of the limits and scope of legislative immunity embodied in the landmark decisions of *Stockdale* v. *Hansard*, 9 A.D. & E. 1, and reflected in the opinions of this Court in interpreting the Speech or Debate Clause, firmly preserves the true purpose of the legislative privileges by "setting them on the foundation of reason and limiting them by the fences of the law". *Stockdale* v. *Hansard, supra.*

3. The recent decision by the Fifth Circuit in the Louisiana branch of the litigation, *Pfister* v. *Arceneaux*, (No. 22562, Nov. 14, 1966) supports the conclusion that the mantle of legislative immunity may not be placed over participation in a conspiracy to carry through illegal raids and seizures. The decision of the Fifth Circuit turns on the recognition that participation in illegal raids, arrests, and seizures, in violation of the Fourth Amendment, is simply not "legitimate" legislative activity. As a result of the *Pfister* v. *Arceneaux* decision all the Louisiana state officials charged with participation in the illegal conspiracy will be required to stand trial in a federal court. The conclusions which underlie the Fifth Circuit decision are equally applicable here. These respondents likewise should be required to stand trial on the disputed issue of fact as to their participation in the illegal conspiracy concerning the October 4 raids.

4. The Solicitor-General appears to agree in this Court, contrary to the position of the respondents below, that the Speech or Debate Clause cannot protect the respondents

from the charge that they were parties to the conspiracy involving the October 4 raids. He prefers to argue as to this central question that the lower court was wrong in finding that there *were* disputed issues of fact as to the respondents' participation in the conspiracy requiring trial. He does suggest, however, that to the degree that the complaint rests *not* on the charge of "complicity in the October 4 searches" but on the unauthorized use of the subpoena power by the respondents, immunity may attach. This suggestion must be rejected for several reasons:

(a) In *Wheeldin* v. *Wheeler,* 373 U.S. 656, in this Court, the Solicitor-General conceded, on essentially similar facts, that the unauthorized use of the subpoena power by a respondent was "not acting sufficiently within the scope of his authority to bring the [immunity] doctrine into play", 373 U.S. at 647.

(b) The Solicitor-General suggests that the admittedly unauthorized use of the subpoena power by the respondents may have been brought back into the sphere of "legitimate legislative activity" by a purported subsequent November 14 resolution of the Subcommittee. This Court has firmly rejected any efforts at retroactive authorization of investigatory activity by a Congressional Committee or Congressman. *Gojack* v. *United States,* 384 U.S. 702, 715.

(c) The requirement of authorization for compulsory process is a fundamental minimal barrier against legislative intrusion into constitutionally insulated areas of the liberties of citizens. *Watkins* v. *United States,* 354 U.S. 200. The recent decisions of this Court make it amply clear that the unauthorized use of compulsory process to enforce investigatory activities which intrude upon the area of protected liberties is not a "legitimate" legislative activity.

II.

1. Respondent Sourwine is not a member of Congress. The protection of the Speech or Debate Clause does not, in any event, extend to him. This question was settled by the Court in *Kilbourn* v. *Thompson* when the Court upheld a cause of action in damages against the Sergeant-at-Arms of the House.

2. The lower court suggests that the doctrine of official or executive immunity as developed by the Court in *Barr* v. *Matteo*, 360 U.S. 564, may extend to respondent Sourwine as an employee of the legislature. But the doctrine enunciated in *Barr* v. *Matteo* does not immunize the charged conduct of respondent Sourwine for several reasons:

(a) The considerations which led the Court in *Barr* v. *Matteo* to extend the immunity doctrine to executive officers are not applicable in the legislative arena. General extension of the executive privilege to employees of the legislature would undermine the proper limitations upon legislative immunity which the Clause itself invokes.

(b) Even if applicable to legislative employees, the Solicitor-General has conceded, in an identical situation, that the doctrine has no applicability here where employees of a Congressional investigating committee utilize unauthorized subpoenas. *Wheeldin* v. *Wheeler, supra.*

(c) The doctrine enunciated in *Barr* v. *Matteo* would permit immunity to attach only where the acts complained of fall within the scope of the official duties of the defendant and relate to matters committed by law to his control or supervision. It is abundantly clear that participation in a conspiracy to contrive illegal raids and searches and seizures, in violation of the Fourth Amendment, was not within the scope of respondent Sourwine's official duties.

(d) Finally, there is a very serious question as to whether the judicially constructed doctrine of official im-

munity is applicable at all to actions brought under the Civil Rights Act. To grant immunity to this respondent who is charged with conspiring with state officials to violate First, Fourth and Fourteenth Amendment rights of citizens through participation in the plans concerning the October 4 raids would nullify the whole purpose of the Civil Rights Statute.

III.

In this Court the respondents have chosen not to remake their argument below that immunity protects them from the charge of participation in the conspiracy concerning the October 4 raids. Instead they rest their defense to this claim on the assertion that summary judgment was proper since the petitioners have failed to put forward a serious claim that the respondents were parties to the conspiracy.

However, the difficulty with this position is that the Court of Appeals has concluded that there *were* disputed facts in the record requiring exploration and resolution by means of a trial as to whether respondents were parties to the knowing concert of action. And the record facts, consisting primarily of admissions contained in the respondents' own affidavits and depositions, fully support the conclusion of the lower court that this issue requires resolution by means of a trial. These record facts show in a startling fashion that "joint and collaborative action was pervasive in the initiation, execution and fulfillment of the plan." *United States* v. *General Motors Corp.*, 86 S. Ct. 1321. The question as to respondents' participation in the conspiracy can only be settled, as the lower court concedes, by resolution at a trial.

IV.

The District Court dismissed the cause of action for equitable relief without a hearing on the allegations treating it as a request for injunctive relief against a Committee of

the Senate. The Court of Appeals properly disregarded this contention pointing out that the complaint sought injunctive relief solely against the individual respondents. However, the Court of Appeals approved the dismissal of the equitable cause of action solely upon the assumption that the relief sought would not be effective, since other members of the Subcommittee would still have use of the seized documents. This assumption was wholly unwarranted on the record. Petitioners were entitled to a hearing to determine the validity, if any, of the defense of futility. *Virginia Ry.* v. *System Federation*, No. 40, 300 U.S. 515, 550. In light of one of the central purposes of the charged conspiracy—the obtaining of membership lists of a civil rights organization—petitioners had good cause to be concerned that these lists, illegally seized in the October 4th raids, might be used privately and improperly by the respondents. In any event, dismissal without a hearing was highly prejudiced and legitimated a course of conduct of respondents designed to frustrate any effort to invoke the processes of law to protect these petitioners from the harmful effects of raids and seizures both the Louisiana courts and this Court have condemned as unlawful.

POINT ONE

The Speech or Debate Clause does not immunize the respondents from liability under the cause of action for money damages.

The decision of the Court of Appeals now brought here for review rests upon a distortion of the doctrine of legislative immunity which is at war with the applicable decisions of this Court interpreting the thrust of the Speech or Debate Clause,[18] as well as the first principles of a govern-

[18] ". . . for any speech or debate in either house, they shall not be questioned in any other place." Article I, § 6, Constitution of the United States.

ment, predicated upon the assumption that no man, no matter how high his position, stands wholly above the law. *Cf. Marbury* v. *Madison*, 1 Cranch 137, 163-168.

The unprecedented implications in the interpretation which the lower court gives to the sweep of the constitutional doctrine of legislative immunity are best seen within the context of an analysis of the structure of the court's own conclusions.

The lower court does not question the jurisdiction of the district court to entertain the cause of action for money damages either under the Constitution [19] or under the Civil Rights Statutes.[20] Nor does the lower court voice any hesitation as to whether the complaint adequately states a cause of action for money damages under the Civil Rights Statutes.[21] And furthermore, the lower court does not seriously entertain any doubts as to the presence in the record of material disputed issues of fact as to whether the respondents were "parties to a knowing concert of action

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[19] *Bell* v. *Hood*, 327 US 678; *Wheeldin* v. *Wheeler*, 373 US 647; *Bock* v. *Perkins*, 139 US 628.

[20] *Monroe* v. *Pape*, 365 US 171; *Lee* v. *Hodges*, 321 F. 2d 480 (CA 4, 1963); *Nesmith* v. *Alford*, 318 F. 2d 110 (CA 5, 1963); *Hughes* v. *Johnson*, 305 F. 2d 67 (CA 9, 1962); *Cohen* v. *Norris*, 300 F. 2d 24 (CA 9, 1962); *Basista* v. *Weir*, 340 F. 2d 74 (CA 3, 1965); *Beauregard* v. *Wingard*, 230 F. Supp. 167 (D.C. S.D. Cal. 1964); *Bargainer* v. *Michal*, 233 F. Supp. 270 (D.C. N.D. Ohio, 1964).

[21] *Monroe* v. *Pape*; *Nesmith* v. *Alford*; *Lee* v. *Hodges*; *Hughes* v. *Johnson*; *Cohen* v. *Norris*; *Basista* v. *Weir*; *Beauregard* v. *Wingard*; *Bargainer* v. *Michal*, all *supra*. Cf. *Dombrowski* v. *Pfister*, *supra*, at p. 490. It is significant in this respect that this Court specifically held in the first Dombrowski opinion that the allegations of that complaint "state a claim under the Civil Rights Act, 42 USC 1983" citing *Beauregard* v. *Wingard*, and *Bargainer* v. *Michal*, *supra*. The allegations of the present complaint for money damages under 1983 are, of course, identical in substance to the *Dombrowski* v. *Pfister* complaint, arising out of the same factual situation. See Statement of Facts, *supra*.

with the state officials . . . requiring exploration and resolution by means of a trial." (R. 105).

Nevertheless, despite clear federal jurisdiction, an adequately pleaded cause of action, and acknowledged genuine issues of fact in the record as to the respondents' participation in a knowing concert of action with state officials under color of state law to engineer illegal raids, seizures and arrests, in violation of the Fourth Amendment for the purpose of depriving the petitioners of federally secured rights, the lower court reads the Speech or Debate Clause as casting a mantle of total immunity over these respondents in any actions for damages resulting from their conduct. This would stretch the immunity doctrine to unrecognizable dimensions and transform a concept historically fashioned as a shield to protect the freedom of speech of legislators from the oppressive tyranny of an overbearing executive, *cf. United States* v. *Johnson*, 383 U. S. 169, 181, into a privileged sanctuary for men in high places to participate in illegal activities destructive of the liberties of the citizens in open violation of the Constitution they are sworn to uphold. *Cf. Stockdale* v. *Hansard*, 9 AD. & E. 1, 112 Eng. Reports 1112 (1839, opinion of Lord Denman. Such a distortion of the concept of legislative immunity finds no support either in the historical matrix in which the constitutional guarantee was shaped or in the landmark decisions of this Court defining the contours of the Clause from *Kilbourn* v. *Thompson*, 103 U.S. 168, to *Tenney* v. *Brandhove*, 341 U.S. 367, to *United States* v. *Johnson, supra*, in the last Term of Court.

1. Legislative immunity is not available to the respondents under the governing decisions of this Court.

(a) TENNEY V. BRANDHOVE DOES NOT SANCTION THE BLANKET IMMUNITY IMPOSED BY THE LOWER COURT.

Although the lower court has found that it would have "considerable difficulty" in concluding that the issue of the respondents' participation with state officials in a

knowing concert of action to illegally seize the SCEF records did not require resolution by means of a trial (R. 105), it nevertheless read the opinion of this Court in *Tenney* v. *Brandhove*, as sanctioning the broad cloak of immunity it cast over the respondents' participation in the illegal conspiracy. *Tenney*, however, rejects any such concept of blanket immunity.

The lower court reads Mr. Justice Frankfurter's opinion for the Court in *Tenney* as requiring the imposition of a shield of legislative immunity in all circumstances where a legislator under color of his official position engages in illegal and unconstitutional activities violative of fundamental rights of citizens. Thus the lower court brushes aside its own conclusion that the record evidence showed contested facts requiring resolution by trial as to respondents' participation in a conspiracy with state officials to utilize Louisiana law to contrive false arrests and illegal raids, by suggesting that "this . . . ignores that the conduct of which appellants [petitioners] complain could not have been undertaken had appellees [respondents] had no official legislative positions and responsibilities" (R. 108-109). But this is the heart of the problem. A doctrine which immunizes the illegal and criminal acts of a legislator merely because the legislator uses his official position to accomplish the violation of law would sanction a governmental tyranny wholly destructive of the liberties of citizens.

No greater danger to a free society exists than the concept that men in high places are immune to the prohibitions of the law merely because they hold these high positions. A policeman who beats a citizen or who seizes his property without a warrant is not immune from legal recourse by the citizen because the policeman wears his uniform and carries his badge while he beats his victim or seizes his possessions in violation of the Fourth Amendment. *Cf. Monroe* v. *Pape, supra.* Similarly, a legislator

who takes part in a conspiracy to defraud the United States is not immune from legal sanction merely because he has utilized his position as a Member of Congress to further the objectives of the illegal conspiracy. *United States* v. *Johnson*, 383 U.S. 169.

The teaching of the Court in *Tenney* refutes the concept which the lower court seems to embrace—that immunity is properly invoked wherever the legislator utilizes his official position to facilitate or to cloak his illegal or criminal activities. *Tenney* rejected any such limitless concept of legislative immunity in a careful opinion by Mr. Justice Frankfurter which, as the entire Court agreed, set forth the "general principles governing the liability of legislative committees and members of the legislature." 341 U.S. at 379, 381.[22]

In *Tenney*, Mr. Justice Frankfurther carefully pointed out that the test of the appropriateness of an invocation of legislative immunity is not the official status of the legislator *qua* legislator but rather the nature of the actions he is called to account for. Thus the critical question becomes whether "it appears that the defendants were acting in the sphere of legitimate legislative activity". 341 U.S. at 376. This is because the sweep of the constitutional immunity extends only to conduct within "the sphere of legitimate legislative activity". 341 U.S. at 376.

The reasons for the limitation of the scope of the immunity to "legitimate legislative activity", 341 U.S. at 376,

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[22] Mr. Justice Douglas, while he dissented from the result of the case, stated that:

> "I agree with the opinion of the Court as a statement of general principles governing the liability of legislative committees and members of the legislature." 341 U.S. at 381.

Mr. Justice Black, in his concurring opinion, stated:

> "I substantially agree with the Court's reasoning and its conclusion." 341 U.S. at 379.

to actions taken "within their traditional sphere . . . where legislators traditionally have power to act . . .", 341 U.S. at 379, are understandable in Mr. Justice Frankfurter's words, "once they are related to the presuppositions of our political history", 341 U.S. at 372. As the Justice so clearly demonstrates, the legislative privilege with its "taproots in the Parliamentary Struggles of the Sixteenth and Seventeenth Centuries", 341 U.S. at 372, was designed to preserve the fundamental freedom of speech of the chosen representatives of the people. The Justice reminds us that the "reason for the privilege . . . was well summarized by James Wilson, an influential member of the Committee of Detail, which was responsible for the provision in the Federal Constitution. 'In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence' ". 341 U.S. at 373.[28]

But "the presuppositions of our political history", 341 U.S. at 372, also teach that an immunity designed to protect the freedom of speech of the elected representatives of the people would never have been conceived of as an open-ended sanction to arbitrary acts of legislators in violation of the fundamental liberties of citizens. The men who deemed freedom of speech "so essential for representatives of the people", 341 U.S. at 372, were also men who were fearful of the "tyranny of legislatures", 367 U.S. at 375, fn. 4. As Justice Frankfurter points out, "It is significant that legislative freedom was so carefully protected by constitutional framers at a time when even Jefferson expressed fear of legislative excess", 367 U.S. at 375. To men to whom "the tyranny of the legislatures is the most formidable dread at

[28] See II works of James Wilson (Andrews ed. 1896) 38, cited in *Tenney* at p. 373.

present, and will be for long years''[24] to men who characterized the legislative department as ''drawing all power into its impetuous vortex''[25] a legislative immunity without boundaries which would carefully protect the liberties of citizens would have been anathema. The lesson of recent English history was too clear. A privilege of legislative immunity without bounds and limits was the path to the dreaded ''tyranny of the legislatures''.[26] Accordingly, as Justice Frankfurter points out, an ''unwarranted extension of privilege'' will not be permitted to be a path for legislatures or legislators to ''acquire power'', 341 U.S. at 366.

The careful formulation of the Court in *Tenney* attempts to accommodate these ''presuppositions of our political history'', *supra*, at 372. The concern for the protection of the freedom of speech of the people's elected representatives is preserved within the context of guarding against a legislative tyranny destructive of the rights of citizens, by insisting, as the Court does in *Tenney*, that the immunity may be invoked only where the legislators are ''acting in the sphere of legitimate legislative activity'', 341 U.S. at 376. It follows, accordingly, that where the acts of a legislator which violate the rights of individuals are not within the sphere of ''legitimate legislative activity'' immunity is

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[24] This statement of Jefferson, Mr. Justice Frankfurter found in a letter to Madison, March 15, 1789, "to be published in a forthcoming volume of The Papers of Thomas Jefferson." (Boyd ed.) 367 U.S. at 375, fn. 4.

[25] Madison, The Federalist, No. XLVIII, cited in 367 U.S. at 375.

[26] See Wittke, *The History of English Parliamentary Privilege*, p. 17. "At first, perhaps, it was essential to make each house the sole judge of its own privileges, but it was not long until this principle was grossly abused. As a matter of fact, both houses, especially in the seventeenth and eighteenth centuries, made such additions to their privileges, and invented so many new ones, that the subject was often the victim of a Parliamentary Tyranny which deprived him of even his ordinary common law remedies and guarantees."

not available. That this constitutional boundary is to be a real one which the Court will enforce is made evident in Mr. Justice Frankfurter's warning that: "This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role. *Kilbourn* v. *Thompson, supra; Marshall* v. *Gordon,* 243 U.S. 521; *Cf. McGrain* v. *Daugherty,* 273 U.S. 135, 176", *supra,* at 377.

The importance of the controlling boundaries for the legislative immunity doctrine developed in Mr. Justice Frankfurter's discussion in his opinion for the Court is highlighted in the concurring opinion of Mr. Justice Black. The Justice sharply emphasizes the limiting character of the Court's analysis in his concurring opinion:

> "The Court holds that the Civil Rights statutes were not intended to make legislators personally liable for damages to a witness injured by a committee exercising legislative power. This result is reached by reference to the long-standing and wise tradition that legislators are immune from legal responsibility for their intra-legislative statements and activities. The Court's opinion also points out that *Kilbourn* v. *Thompson,* 103 US 168, 28 L.Ed. 377, held legislative immunity to have some limits, and today's decision indicates that there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally liable in a suit brought under the Civil Rights Act. I substantially agree with the Court's reasoning and its conclusion." 341 US at p. 379.

Far from sanctioning a blanket immunity for the complained of acts of the respondents, the principles enunciated in *Tenney,* in Mr. Justice Frankfurther's opinion for the Court and underscored in the concurring opinion require a reversal of the judgment below and a reinstitution of the cause of action for money damages. Having rejected respondents' primary position—that petitioners had failed to

put forward a serious claim that respondents were parties to a knowing concert of action with the state officials, requiring exploration and resolution by means of a trial (R. 105)—the lower court's invocation of immunity in the name of *Tenney* flies in the face of the clear limiting words of that opinion. Participation in a conspiracy with state officials to utilize state laws to contrive the arrest of citizens without cause, to engineer raids on their offices and homes and to seize their property in violation of the Fourth Amendment, is hardly "legitimate legislative activity". *Cf. Tenney*, 341 US at p. 376.[27] Nor is such a conspiracy to violate the federal rights of citizens "a field where legislators traditionally have power to act". *Cf. Tenney*, 341 US at p. 379. As Mr. Justice Black warned in his concurring opinion, the Court in *Tenney* has said "that there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally liable in a suit brought under the Civil Rights Act." 341 US at p. 379. This case presents to the Court such a point. It is difficult to imagine any conduct which more "exceeds the

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[27]We do not feel that it is necessary to argue at any great length that a conspiracy to violate the Fourth Amendment rights of citizens is not within any conventionally understood meaning of the word "legitimate" legislative activity. *Cf. Pfister* v. *Arceneaux, supra,* opinion of Circuit Judge Wisdom, Appendix E to this Brief. The values which the Fourth Amendment protects are among the most fundamental in our civilization. *Boyd* v. *United States,* 116 U.S. 616 (opinion by Mr. Justice Bradley); *Weeks* v. *United States,* 232 U.S. 383; *Mapp* v. *Ohio,* 367 US 643. *Cf. Entick* v. *Carrington,* 19 How. St. Tr. 1029 (C.P. 1765). See *Berkowitz* v. *United States,* 340 F.2d 168 (CA 1, 1965, opinion by Judge Wyzanski) "We need not rehearse here the historical, political, and ethical considerations underlying the Amendment. The American view of ordered liberty finds no clearer distinction from totalitarianism or other forms of despotism than in our recognition that privacy is a principal object of civilization. We are held together as a community by our respect for one another." 340 F.2d at 170. It is unthinkable that a "knowing concert of action" to violate these fundamental interests of citizens could ever be regarded as a "legitimate" legislative activity. *Cf. Tenney,* 341 U.S. at p. 376.

bounds of legislative power". If participation in a conspiracy with state officers to engineer illegal raids and seizures in violation of the Fourth Amendment is to be immune from redress in a court of law under some formless concept of legislative immunity then we would face, in truth, the reality of Jefferson's "formidable dread" of "the tyranny of legislatures". *Tenney*, 341 US at p. 375. *Tenney*, however, sanctions no such distortion of the original purposes of the Constitutional provision. Since the charged participation of respondents in the illegal conspiracy is under no possible interpretation of the record facts "within the sphere of legitimate legislative activities", *Tenney* requires the reinstatement of the cause of action for money damages.[28]

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[28]The application of the *Tenney* principles to the facts in that case underscores the conclusions that here the acts complained of lie outside the sphere of "legitimate legislative activity". In *Tenney* the theory of the complaint was that a legislative hearing was held for improper reasons resulting in damage to the plaintiff. The Court pointed out that this act, the holding of the legislative hearing, was a "traditional" and "legitimate legislative activity". 341 U.S. at 378, 379. This was the sole thrust of the complaint. The Court emphasized that if the legislative hearing "exceeded the bounds of legislative power" the result would be different. 341 U.S. at 378. But as the Court there said, "the present case does not present such a situation." 341 U.S. at p. 378. All that the plaintiff in *Tenney* complained of was the impact upon him of a legitimate legislative activity, improperly motivated. And as the Court said, "the claim of an unworthy purpose does not destroy the privilege." 341 U.S. at p. 377. *Cf. United States* v. *Johnson, supra.* Here, unlike in *Tenney*, the complaint concerns not a "legitimate legislative activity" such as an authorized and proper legislative hearing, (but see Mr. Justice Douglas' dissent in *Tenney*, 341 U.S. at p. 381) which is claimed to be improperly motivated, or a speech on the floor claimed also to be improperly motivated, cf. *United States* v. *Johnson, supra*, but rather activity itself clearly outside the sphere of "legitimate legislative activity"—participation in a conspiracy to contrive under color of state law illegal raids, seizures, and arrests. Under *Tenney* the acts complained of, to be immunized, must be *legitimate* legislative activity. See the recent opinion of Circuit Judge Wisdom for the Fifth Circuit, in the Louisiana branch of the current litigation,

(b) The Opinion in United States v. Johnson Forecloses Reliance upon the Speech or Debate Clause as Immunizing Respondents' Conduct.

Only last Term the Court warned against a distortion of the legislative immunity doctrine which would blunt the distinction between "legitimate legislative activity" *cf. Tenney, supra,* at p. 376, protected by the Speech or Debate Clause, and unlawful conduct for which a legislator remains accountable at law. In *United States* v. *Johnson,* 383 U.S. 169, 86 S. Ct. 749 (1966), Mr. Justice Harlan, in the opinion for the Court reversing the conviction of a Congressman for violation of the conflict of interest statute and conspiracy to defraud the United States, carefully pointed out that while reliance upon a speech made by the defendant on the floor of the House during the trial of the conspiracy count violated the Speech or Debate Clause, only the speech was immunized and not the charged unlawful conduct or the conspiracy itself. Thus Mr. Justice Harlan warned for the Court:

> "The bulk of the evidence submitted as to Johnson dealt with his financial transactions with the other conspirators, and with his activities in the Department of Justice. As to these aspects of the substantive counts and the conspiracy count, no substantial question is before us. 18 U.S.C. § 371 has long been held to encompass not only conspiracies that might involve loss of government funds, but also 'any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any

Pfister v. *Arceneaux* (Nov. 14, 1966, Appendix E to this Brief), applying this analysis to motions of the members of the Joint Louisiana Committee seeking to be dismissed as third-party defendants in the first action brought in the Louisiana federal courts. The Court of Appeals for the Fifth Circuit has found that a disputed issue of fact as to the defendant committee members' participation in the raids and seizures raises a question of fact as to whether their activities could be immunized under *Tenney* as "*legitimate* legislative activity" (emphasis supplied by the Court) precluding the granting of summary judgment. See Appendix E.

> department of government.' *Haas* v. *Henkel*, 216 U.S. 462, 479, 30 S. Ct. 249, 254, 54 L.Ed. 569. No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice that is in no wise related to the due functioning of the legislative process."

The sharp distinction drawn by the Court between the limited immunizing effect of the Clause upon the speech made on the floor of the House and the charged unlawful conspiracy is highlighted by the Court's action in *Johnson*. The Court of Appeals' opinion might have been interpreted as dismissing in its entirety the conspiracy count as "unconstitutional as applied to defendant Johnson" under Article I, § 6. *United States* v. *Johnson*, 337 F.2d 180 (CA 4, 1964, opinion by then Chief Judge Sobeloff). This Court carefully corrected this disposition of the conspiracy count, holding in Mr. Justice Harlan's words:

> "The Court of Appeals' opinion can be read as dismissing the conspiracy count in its entirety. The making of the speech, however, was only a part of the conspiracy charge. With all references to this aspect of the conspiracy eliminated, we think the Government should not be precluded from a new trial on this count, thus wholly purged of elements offensive to the Speech or Debate Clause."

Thus the Court in *Johnson* did not sanction any overall immunity for the Congressman *qua* Congressman but remanded both the conspiracy counts and the substantive counts, "purged of elements offensive to the Speech or Debate Clause"—namely the speech itself—for a new trial.[29]

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[29]The Chief Justice, with Mr. Justice Brennan and Mr. Justice Douglas, would have gone further. They would have affirmed the substantive counts for violation of the conflict of interest statute without remanding for a new trial on the ground that in the trial on the substantive counts "the speech was a minor part of the prosecution." *United States* v. *Johnson*, *supra*, at p. 189.

The impact of the teaching of *United States* v. *Johnson* upon this case is clear. As in *Johnson*, we do not believe that it could be successfully contended that the Speech or Debate Clause reaches conduct such as was involved in the presently charged conspiracy to utilize the overly broad anti-subversive laws of the State of Louisiana, *cf. Dombrowski* v. *Pfister, supra,* to contrive the illegal raids, seizures and arrests in violation of the Fourth Amendment. Such conduct is no less heinous than an "attempt to influence the Department of Justice", cf. *United States* v. *Johnson*, at p. 172, and no less prohibited by applicable federal statutes.[30] As in *Johnson* the "bulk of the evidence"

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[30]The conspiracy here charged is not only prohibited by the civil sanctions of 42 U.S.C. 1983 and 1985, *Cf. Dombrowski* v. *Pfister, supra,* at p. 490, but would appear also to present a *prima facie* case of violation of the applicable criminal statutes, 18 U.S.C. 241 and 242. Cf. the recent opinions of the Court in *United States* v. *Price*, 383 U.S. 787, 86 S.Ct. 1152; and *United States* v. *Guest*, 383 U.S. 745, 86 S.Ct. 1170 (1966).

It is readily apparent that the allegations made in the present complaint would be sufficient to sustain an indictment brought under either 18 U.S.C. §§ 241 or 242 as interpreted by this Court in *United States* v. *Price, supra,* if brought against either of the two respondents. The complaint alleges that, acting in concert with officials of the State of Louisiana, and under color of statutes of that state (since partially invalidated by this Court, *Dombrowski* v. *Pfister, supra*), the respondents conspired to obtain the records and files of the individual and corporate petitioners, and that to effectuate this purpose the state officials arranged to have the individual petitioner arrested and charged with violation of such statutes and, "incidental" to that arrest, to have the offices and home of the petitioners searched and ransacked and all pertinent materials removed therefrom, and further conspired to have the documents so seized surreptitiously removed from the State of Louisiana to the State of Mississippi. While respondents are not themselves officials of any state, it is clear from *Price* that 241 and 242 only require that they act in concert with such officials. "It is enough that he is a wilful participant in joint activity with the State or its officials." 383 U.S. at 794; see also *id.* at 799. It is also alleged that the respondents conspired to deprive the petitioners of rights protected by

[Footnote Continued on Page 42]

here deals with the respondents' "transactions with the other conspirators" and their "knowing concert of action" (R. 105), with the state officials in planning and contriving the illegal raids and seizures. This is action, analogous to the conspiracy charged in *Johnson*, which "is in no wise related to the due functioning of the legislative process", *supra*, at p. 172. It is action which the Speech or Debate Clause does not reach, *supra*, at p. 172.

The Court in *Johnson* underscores the nature of the conduct which is not reached by the immunizing scope of the Clause, when it focuses on the precise question which

[Footnote Continued from Page 41]

the Due Process Clause of the Fourteenth Amendment, most importantly the freedom from unlawful search and seizure, see *Mapp* v. *Ohio*, 367 U.S. 643, violated when the seizures were conducted under arrest warrants not based on probable cause, and the right to freedom of association, see *NAACP* v. *Flowers*, 377 U.S. 288, *Louisiana* v. *NAACP*, 366 U.S. 293, *NAACP* v. *Alabama*, 357 U.S. 449, violated when privileged membership lists were seized. The complaint charged that the respondents, together with the Louisiana state officials, sought to utilize the Louisiana laws as a pretext for the obtaining of the membership lists through raids and seizures, which they could not have obtained through lawful legislative process. As stated in *Price*, the language of § 241 "embraces *all* of the rights and privileges secured to citizens by *all* of the Constitution and *all* of the laws of the United States." 383 U.S. at 800. Further, the Court in *United States* v. *Guest*, 383 U.S. 745, holds that even a conspiracy by persons themselves having no official status will constitute an offense when they use the machinery or processes of the state to achieve their objective of depriving persons of federal rights. Here the complaint clearly alleges that the respondents conspired to use the processes of the state to obtain material they had no right to obtain and to do so in a manner they had no right to use in order to intimidate the petitioners and other citizens from seeking to implement the promise of racial equality guaranteed by the Equal Protection Clause. See, also, *Brown* v. *United States*, 204 F.2d 247 (6th Cir. 1953); *United States* v. *Ramey*, 336 F.2d 512 (4th Cir. 1964) cert. den. 379 U.S. 972; *Culp* v. *United States*, 131 F.2d 93 (8th Cir. 1942).

the prosecution there raised in terms of the impact of Article I, Section 6. Neither the conspiracy on its face nor the attempts to influence the Department of Justice raised any constitutional questions of immunity. Rather it was "the application of this broad conspiracy statute to an improperly motivated speech that raises the constitutional problem", *United States* v. *Johnson, supra,* at 172. The speech on the floor of the House falls within the protective orbit of the privilege. A speech on the floor, as Mr. Justice Harlan points out, clearly is included in the definition of the sweep of the Clause first suggested by the Court in its initial discussion of the constitutional provision in *Kilbourn* v. *Thompson,* 103 U.S. 168, that the "privilege should be read broadly to include not only 'words spoken in debate', but anything 'generally done in a session of the House by one of its members in relation to the business before it', 103 U.S. at 204", *United States* v. *Johnson, supra,* at p. 179. Where the essence of a charge is that a Congressman's act, such as making a speech, *United States* v. *Johnson, supra,* or proposing a resolution, *Kilbourn* v. *Thompson, supra,* is "improperly motivated", "this is precisely what the Speech or Debate Clause generally forecloses from executive or judicial inquiry." *United States* v. *Johnson, supra,* at p. 180. This is because the "prophylactic purposes of the clause", *supra,* at 182, to preserve the freedom of speech of the people's representatives, require that judicial or executive exploration into motives underlying legitimate legislative activity, "generally done in a session of the House", not be the occasion for harassment or intimidation of legislators. *Supra,* at 179-181. Cf. *Tenney* v. *Brandhove, supra; Fletcher* v. *Peck,* 6 Cranch 87, 130. Accordingly, in *Johnson,* the Court "purged" the conspiracy and substantive charges against the Congressman of any exploration into his motives in making the speech on the floor, while remitting the

cause back for a new trial on the charges of illegal conspiracy and violation of the conflicts of interest statute.[31]

Here, the conduct charged against the respondents is wholly beyond the protective orbit of the Speech or Debate Clause as delineated by the Court in *Johnson*. Unlike *Johnson*, in this case there is not even the necessity of "purging" the conspiracy count of "elements offensive to the Speech or Debate Clause", *supra*, at 187. This case does not rest in whole, or in part, upon a speech given by the respondents, cf. *United States* v. *Johnson*, *supra*, or upon a resolution offered on the floor, cf. *Kilbourn* v. *Thompson*, *supra*, or upon a duly authorized legislative hearing, *Tenney* v. *Brandhove*, *supra*. The respondents here are charged with conduct "in no wise related to the due functioning of the legislative process", *United States* v. *Johnson*, *supra*, at 172. Participation in a conspiracy with state officials to instigate illegal raids, seizures and arrests in violation of the Fourth Amendment is hardly activity "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson*, 103 U.S. at 204, cf. *United States* v. *Johnson*, *supra*, at 179. The gravamen of this complaint is not that "legitimate legislative activity" was "improperly motivated". Its thrust is wholly different. The charge here is that the respondents' participation with the state officials in the illegal conspiracy was "in no wise related to the due functioning of the legislative process", *United States* v.

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[31] The limited impact of the immunity clause is emphasized in the concurring Justices' characterization of the Court's holding. Thus the Chief Justice wrote, in an opinion joined in by Mr. Justice Douglas and Mr. Justice Brennan:

> "I concur in the limited holding of the Court that the use of the Congressman's speech during this particular trial—with an examination into its authorship, motivation and content—was violative of the Speech and Debate Clause. I also join the Court in its remand of the conspiracy count for a new trial, this time purged of offensive matter." [*Supra*, at pp. 186-187.]

Johnson, supra, at p. 172. Such conduct, similar to the conspiracy and substantive charges in *Johnson* remitted for a new trial, is not reached by the Speech or Debate Clause.

As in *Tenney*, the careful opinion of the Court in *Johnson*, rejecting any limitless sweep to the concept of legislative immunity, rests as it must, upon a thoughtful probing of the "presuppositions of our political history" *Tenney* v. *Brandhove, supra,* at p. 372. Mr. Justice Harlan cautions us in approaching the Speech of Debate Clause to "look particularly to the prophylactic purposes of the clause" *United States* v. *Johnson, supra,* at p. 182. These he finds emerging out of the long "history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators" *United States* v. *Johnson, supra,* at 178. Out of this historical matrix was fashioned the concept of legislative privilege which reflected a determination to protect the freedom of speech and debate of the representatives of the people from "intimidation by the executive and accountability before a possibly hostile judiciary" *supra,* at p. 181. This concern with protecting the freedom of speech of the people's representatives against intimidation by a hostile executive or judiciary, Justice Harlan concludes, "is the predominate thrust of the Speech or Debate Clause", *supra,* at 182. But it would be ironic, indeed, if the legislative privilege of immunity designed to protect the free speech of legislators so that they may fearlessly represent the people's interest were to be turned into an instrument for the destruction of the free speech of citizens. Yet this will be the result unless the distortion of the immunity doctrine reflected in the lower court's opinion is not firmly rejected.

In illustrating for us the "prophylactic purposes" of the Speech and Debate Clause, *United States* v. *Johnson, supra,* at p. 182, Mr. Justice Harlan analogizes its thrust

to "the central importance to our political system of uninhibited political expression as guaranteed to the general populace by the First and Fourteenth Amendments" *supra*, at p. 182, fn. 12. This insight is instructive in understanding the necessity for a rigorous enforcement of the boundaries and limitations which history and the Court have written into the Speech and Debate Clause. Both constitutional values—"the independence and integrity of the legislature" on the one hand, *supra*, at 178, and "uninhibited political expression as guaranteed to the general public" on the other hand, *supra*, at 182,—are deeply interwined as the Court has recognized, *supra*, at 182, fn. 12. These separate but interrelated values are but reflections of a fundamental axiom upon which our society rests—the right of the people to govern themselves and to control their own destinies. *Cf. Whitney* v. *California*, 274 U.S. 357, 374 (concurring opinion of Mr. Justice Brandeis). If the central thrust of the Speech or Debate Clause is to protect the right of the people to self-government through a fearless and independent legislature it would frustrate that design and make a mockery out of its high purpose if it were to be read so as to sanction illegal activities of legislators which trench upon fundamental rights of citizens for the very purpose of impeding the "uninhibited political expression" which is equally "central . . . to our political system" *United States* v. *Johnson*, *supra*, at p. 182, and equally important to the ultimate question of the right of the people to govern themselves. *New York Times Co.* v. *Sullivan*, 376 U.S. 254.

Mr. Justice Harlan's opinion for the Court in *United States* v. *Johnson* makes it crystal clear that the Speech and Debate Clause may not be read in such a manner as to distort its basic purpose. An adjustment between the separate but interrelated values of the "independence and integrity of the legislature" and the "central importance of uninhibited political expression . . . [by] the general populace" can be achieved through the repudiation of the limitless and

open-ended immunity concept applied by the lower court, and an insistence that the boundaries of *Tenney* and *Johnson* be rigorously enforced, particularly where the doctrine of legislative privilege threatens to become a blanket immunity for unlawful acts, unrelated to the due functioning of the legislative process, and destructive of the fundamental liberties of the citizens.

A proper deference to the paramount constitutional objective of "uninhibited political expression", *United States* v. *Johnson, supra,* at p. 182, consistent with the protection of the "independence and integrity of the legislature", *United States* v. *Johnson, supra,* at p. 178, requires that the limitations to the legislative immunity doctrine, restated by the Court in both *Tenney* and *Johnson,* be adhered to and reaffirmed, particularly where, as in this case, the acts of the legislator, unrelated to any legitimate legislative activity, interfere with and deter the exercise of those rights the Court has characterized as being "central to our political system." *United States* v. *Johnson, supra,* at p. 182.

(c) No Legislative Immunity Attaches to the Acts of the Respondents Under the Rule of Kilbourn v. Thompson

Kilbourn v. *Thompson,* 103 U.S. 168 (1880) was the first occasion this Court had to consider the implications of the Speech or Debate Clause. In a comprehensive opinion the Court analyzed the boundaries of the legislative immunity doctrine and established certain guidelines which underlie the more recent decisions in *Tenney* and *Johnson.* These guidelines remain helpful in considering the impact of the constitutional privilege upon the present case.

Central to the Court's thinking in *Kilbourn* was the recognition that legislative immunity did not extend generally to everything a legislator did, regardless of its

relationship to the legislative process. The immunity was, as Mr. Justice Miller pointed out, limited to "things generally done in a session of the House by one of its members in relation to the business before it" 103 U.S. at 204. Thus, in applying the doctrine to the record before it, the Court drew a sharp distinction between certain acts of illegal arrest, trespass, and assault upon the plaintiff and the acts of presenting and voting for a resolution authorizing the actual arrest. The defendant members of Congress were charged only with the acts of presenting and voting for the resolution. Accordingly, although the Court had held, in a historic ruling, that the resolution of contempt voted against the plaintiff was in excess of the power conferred upon the House by the Constitution, and consequently void for want of jurisdiction, 103 U.S. at 196, the issue remained as to whether the defendant Members of Congress could be held liable in damages to the plaintiff. Here, the essence of the *Kilbourn* analysis emerges. Participation in any way in the unlawful acts of arrest or confining the plaintiff lay beyond the reach of any protective immunity mantle, 103 U.S. at 200, 201. The resolution or warrant of the House ordering the arrest, being void for want of jurisdiction, 103 U.S. at 196, were not available as a justification for any individual participating in the actual unlawful arrest or wrongful imprisonment, 103 U.S. at 200. Accordingly, the defendant, Thompson, Sergeant-at-Arms of the House, was held to be not immune to the cause of action for damages for unlawful arrest, 103 U.S. at 200, 205, not only because he was not a member of the legislature, *cf. Tenney* v. *Brandhove,* 341 U.S. at 378, but because legislative immunity itself did not attach to acts such as the wrongful arrest and imprisonment. These were acts which were not "things generally done in a session of the House by one of its members in relation to the business before it", 103 U.S. at 204.

On the other hand, where the only ground for assertion of liability rested upon "things generally done in a session

of the House by one of its members" such as "written reports presented in that body by one of its committees", 103 U.S. at 204, "resolutions offered", 103 U.S. at 204, "the act of voting, whether it is done vocally or by passing between the tellers", 103 U.S. at 204, the protection of the Speech or Debate Clause could be asserted, 103 U.S. at 201, 204. Where the only connection between the Congressmen defendants and the wrongful acts lay in their authorization of the acts through proposing and assenting to a resolution of the House, "things generally done in a session", the Clause provided immunity. 103 U.S. at 205.

The analytical basis for the *Kilbourn* opinion emerges clearly. There is no legislative immunity for wrongful, illegal, or criminal acts which are not those acts "generally done in a session of the House by one of its members in relation to the business before it". 103 U.S. at 204. Such an act was the illegal arrest and detention of the plaintiff *Kilbourn*. No immunity attached to anyone participating in this wrongful act whether or not the participant was a legislator. *Cf. United States* v. *Johnson*, 383 U.S. 169. The sweep of the immunity clause covers only legitimate legislative conduct through which the constitutional right of legislative free speech manifests itself [32] such as a speech

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[32] The analogy to those cases in which this Court has discussed the constitutional guarantee of free speech is interesting. Cf. *United States* v. *Johnson*, 383 U. S. at 182, fn. 12. Where the act sought to be immunized from punishment is "pure speech", the making of a speech, *Thomas* v. *Collins*, 323 U.S. 516 (1944), the distribution of a leaflet, *Lovell* v. *Griffin*, 303 U.S. 444 (1937); cf. *Thornhill* v. *Alabama*, 310 U.S. 88 (1939), the publication of a newspaper, *Near* v. *Minnesota*, 238 U.S. 691 (1930); *New York Times* v. *Sullivan*, 376 U.S. 254 (1963), the First Amendment immunization from liability is almost absolute subject, of course, to the qualifications of the "clear and present danger" or requirement of "malice" limitations on the otherwise absolute immunity. *Schenck* v. *United States*, 249 U.S. 471 (1919); *New York Times* v. *Sullivan*, *supra*. Where on the other hand the act sought to be immunized has left the arena of "pure speech" and is in reality conduct otherwise illegal

[Footnote Continued on Page 50]

itself, *United States* v. *Johnson, supra,* a formal legislative hearing, *Tenney* v. *Brandhove, supra,* or the presentation of a committee report, the offering of a resolution, or the act of voting, *Kilbourn* v. *Thompson, supra.* Where the claimed responsibility for a wrongful or illegal act rests *solely* upon legitimate legislative activity such as offering and voting for a resolution, the Clause will immunize the legislator from liability for the wrongful act. *Kilbourn* v. *Thompson, supra.*[33] Where, however, the cause of action for

[Footnote Continued from Page 49]

under either state or federal law, the cases suggest that the immunity of the First Amendment may not here apply. *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1948); *Valentine* v. *Chrestenson*, 316 U.S. 52 (1941); *Garrison* v. *Louisiana*, 379 U.S. 64 (1964); concurring opinion of Mr. Justice Black, 379 U.S. at 79. So in the area of legislative immunity where the acts of the legislator remain in the arena of "legitimate legislative activity" through which the constitutional right of legislative free speech manifests itself, *Kilbourn* v. *Thompson*, an absolute immunity exists subject to the *Kilbourn* proviso of an "act of an extraordinary character", 103 U.S. at 204. However, where the acts in question have left the arena of "legitimate legislative activity" and have become conduct otherwise wrongful or illegal, the constitutional immunity does not apply. *United States* v. *Johnson, supra.*

[33] Even here the *Kilbourn* Court suggested an important proviso. Even where the acts upon which liability is sought rest solely upon legislative activity undertaken in the legislature itself, such as passing a resolution, the Court warned that immunity may not be absolute. As Mr. Justice Miller pointed out:

> "It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible. If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate."

[Footnote Continued on Page 51]

legal redress rests *in part* upon legitimate legislative activity such as the act of making a speech on the floor of the House, the Clause will require a "purging" of the legal action of "elements offensive to the . . . Clause" but will not immunize the wrongful act or protect the legislator from trial. *United States* v. *Johnson, supra.* And finally, where, as here, the cause of action, like the cause of action against the Sergeant-at-Arms Thompson, rests wholly upon wrongful and illegal conduct which is not "generally done in a session of the House by one of its members" such as participating in an unlawful arrest, *Kilbourn* v. *Thompson,* or participating with state officers in a conspiracy to instigate illegal raids and seizures (R. 105), no legislative immunity attaches whatsoever. *Kilbourn* v. *Thompson, supra.*

[Footnote Continued from Page 50]

As in *Kilbourn* it is not necessary for this Court "to decide here" whether the acts charged to respondents are of the "extraordinary character" warned against by Mr. Justice Miller. The effort here is not to hold these respondents to account for any "legitimate legislative activity" *cf. Tenney* v. *Brandhove, supra,* or activity "generally done in a session of the House", *Kilbourn* v. *Thompson,* 103 U.S. at 204. The acts charged to the respondents, the participation in the knowing concert of action with the state officials to effectuate the illegal raids, seizures and arrests, are of course not of this nature. If, however, the acts of the respondents were to be considered in some way as being "legitimate legislative activity", and on this record we would suggest that such an assumption would be impossible, the Court would only then face the necessity of considering whether the moment Mr. Justice Miller warned of in *Kilbourn* had arrived—whether the conduct of respondents, although "generally done in a session of the House", was of such "an extraordinary character" that the "members who take part in the act may be held legally responsible". 103 U.S. at 204, 205. We would suggest at that point that participation in an illegal conspiracy with state officials in violation of federal law and the federal Constitution to carry through unconstitutional raids, arrests and seizures, in flagrant violation of the Fourth Amendment, was an act of such "an extraordinary character" as not to be "screened from punishment by the constitutional provision for freedom of debate". 103 U.S. at 205. The Court does not necessarily reach this question, however, since as we have pointed out, the acts in question are not such as to normally invoke the protection of the immunity Clause.

2. The History of Legislative Privilege and the Decisions of the English Courts Support the Conclusion That Immunity is Not Available to the Respondents.

The landmark opinions of the Court which deal with the Speech or Debate Clause anchor their analysis in the political history out of which the concept of legislative immunity was fashioned and shaped. Mr. Justice Harlan only recently reminded us that in considering the impact of the doctrine upon a given prosecution we must "look particularly to the prophylactic purposes of the clause" shaped as they were by "the long struggle for parliamentary privilege in England", *United States* v. *Johnson*, 383 U.S. at 182. Mr. Justice Frankfurter insisted that questions involving the scope of the immunity embraced by the Clause can be best understood "once they are related to the presuppositions of our political history", *Tenney* v. *Brandhove*, 341 U.S. at 372. Perhaps in no other area of constitutional analysis is the admonition so valid that a "page of history is worth a volume of logic". *New York Trust Co.* v. *Eisner*, 256 U.S. 345 at 349 (opinion of Mr. Justice Holmes). It is with these guiding comments from the Court in mind that we turn briefly to an examination of the "taproots" of the legislative privilege, 341 U.S. at 372, not in an effort to replough ground already fully explored by the Court, *United States* v. *Johnson*, 383 U.S. at 182-183, *Tenney* v. *Brandhove*, 341 U.S. at 372, *Kilbourn* v. *Thompson*, 103 U.S. at 201, 202, but in order to suggest that a refusal to immunize the acts of respondents now before the Court is as consistent with the "presuppositions of our political history" as was the decision last Term in *United States* v. *Johnson* to immunize the speech on the floor of the House of the respondent then before the Court. We would suggest that there is a complex and double-sided history to the emergence of the principle embedded in the Speech or Debate Clause which throws light upon the restrictive boundaries of the concept of legislative immunity which the Court has endeavored to spell out from *Kilbourn* to *Johnson*.

It is now well documented that the legislative privilege was "born primarily of a desire . . . to prevent intimidation by an executive and accountability before a possibly hostile judiciary", *United States* v. *Johnson*, 383 U.S. at 181, that the great formulation of legislative freedom of speech and debate of 1689 [34] was "the culmination of a long struggle for parliamentary supremacy", 383 U.S. at 178, that behind the "simple phrases" of the fundamental guarantee of legislative free speech "lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators", 383 U.S. at 178. Finally "there is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause." 383 U.S. at 182.[35] The emergence of the principle of legislative freedom of speech as a bulwark of the representatives of the people and a protection of their "independence and integrity" against an oppressive sovereign and his controlled judges, too often "lackeys of the . . . monarchs", 383 U.S. at 181, has become a well understood theme of our constitutional heritage.

But what is not as often discussed is that there were always two sides to the history of the development of

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[34] "That the Freedom of Speech and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament," 1 W. & M. Sess. 2, c. 2.

[35] See, for a generally comprehensive history of the emergence of the legislative privilege, *Wittke, The History of English Parliamentary Privilege* (Ohio State Univ. 1921); Taswell-Longmead, *English Constitutional History*, (*11th ed. Plucknett*, 1960); Neale, *The Commons' Privilege of Free Speech in Parliament* (*Seton-Watson ed. 1924*).

legislative privilege—two contradictory and conflicting pulls which shaped and fashioned the long and tortuous history of the development of principles of law which defined and restricted the legislative privilege.[36] Professor Wittke, whose study of the history of English Parliamentary privilege has been authoritatively referred to by this Court, *United States* v. *Johnson*, 383 U.S. at 178, places the two sides to the history of the Parliamentary privilege in the following incisive manner:

> "Privilege played an important role in the great political struggles of the past centuries. At times claims of privilege were used to champion the cause of the people; there were also times when privilege became the greatest oppressor of the subject's liberty. Parliamentary privilege has frequently served as a bulwark of liberty and individual freedom, but on the other hand, in the hands of crafty, powerful and designing politicians eager to perpetuate their control and to gain the utmost personal advantage, privilege has been used as a screen for the basest oppression. There were times when privilege was used to give legal color to a Parliamentary Despotism as oppressive of individual liberty as many Kings with their claims of prerogative have been." [37]

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[36] The Court has examined a closely related, and therefore instructive, area of the law of legislative privilege in *Watkins* v. *United States*, 354 U.S. 178 (1957). In that case the Court discussed in some detail the Parliamentary abuse of the power to punish for contempt, commenting: "The origin of privileges and contempts extends back into the period of the emergence of Parliament. The establishment of a legislative body which could challenge the absolute power of the monarch is a long and bitter story. In that struggle Parliament made broad and varied use of the contempt power. . . . It seems inevitable that the power claimed by Parliament would have been abused. Unquestionably it was."

354 U.S. at 188, 189.

[37] Wittke, *The History of English Parliamentary Privilege* (Ohio State Univ. Studies, 1921), p. 15.

Professor Wittke summarized the complex double aspect of the history of the privilege and the impact of this duality upon the development of English law defining the scope of the immunity, in this way:

> "Privilege has been both the bulwark of English liberty and the most ruthless oppressor of the rights of subjects. It has proved a means for the advancement of democracy and representative government and institutions in the hands of some, and again, it has been a tool of oppression in the hands of a corrupt, mercenary, time-serving oligarchy of politicians desirous of perpetuating their power. The proper adjustment of privilege to the other existing laws and institutions was worked out very slowly." *Wittke, supra,* at p. 206.

Professor Wittke has here highlighted an aspect of the history of the development of the parliamentary privilege which is critically illuminating in understanding the necessity for the firm enforcement by the courts of law of sharply limiting boundaries upon the concept of legislative immunity. Side by side with the danger to the independence of Parliament which resulted from an infringement upon their privileges by the executive and its courts, there emerged what Professor Wittke has termed "a far more serious aspect of the matter" for "at times parliamentary privilege became a serious menace to the liberty of the subject."[38] As long as parliamentary privilege, based upon the "lex parliamenti" was beyond all cognizance by the courts of law administering the "lex terrae", if its definition, scope and sweep, the law of privilege itself, was "known only to Parliament", [39] as long as no court had

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[38] *Wittke, supra,* at 198. See also *Brass Crosby's Case,* 3 Wils. 199; *Regina* v. *Paty,* 2 Ld. Raym. 1105; *Sir Robert Pyle's Case,* 5 How. St. Tr. 948; *Entick* v. *Carrington,* 19 How. St. Tr. 1047.

[39] *Ashby* v. *White,* 2 Ld. Raym. 938—Opinions of Justice Gould at 941, Justice Powys at 944; *Brass Crosby's Case,* 3 Wils. 199; *Entick* v. *Carrington,* 19 How. St. Tr. 1047.

the authority to define and place limitations upon the immunities, there was nothing "to prevent unwarranted encroachments upon even the most sacred guarantees of individual liberty." [40] And as Professor Wittke points out in fact "the law of privilege was made the justification for abuses of the rights of the subject, as flagrant as those committed under the law of prerogative ever were."[41] For many years injured subjects had no redress against an indiscriminate extension of parliamentary immunities. The ordinary courts of the Kingdom were considered "inferior to the High Court of Parliament and could not pass judgment on its claims of privilege.[42] With the extension

[40] *Wittke, supra,* at 199.

[41] *Wittke, supra,* at 199. Professor Wittke cites many examples of the "Parliamentary tyranny" which resulted from unchecked extension of the parliamentary privilege. For example, in 1675, in the case of *Shirley* v. *Fagg,* 9 Com. J. 354, 6 How. St. Tr. 1162, Wittke points out that the Commons "boldly claimed for the law and custom of Parliament a power transcending the sacred guarantees of Magna Carta and the Petition of Right". *Wittke,* at p. 95. See, also, *The Case of the Earl of Shaftesbury,* 1 Modern Repts. 144 *et seq.* The famous cases of *John Wilkes and the Middlesex Election,* see May's *Constitutional History of England,* Chaps. IX, X, XI, became, in the words of Professor Wittke, "eventually a contest between the electors of England and the Crown—the latter acting through a controlled and bought House of Commons." And Wittke concludes "under the guise of privilege, the Parliament houses infringed more and more upon the fundamental rights of the electorate of England." *Wittke,* at P. 118. The cases involving Wilkes, such as *Entick* v. *Carrington,* 19 How. St. Tr. 1154, are well known for their historic contributions to the preservation of personal liberty. But in addition, as Wittke points out, the long struggles of Wilkes demonstrated dramatically "how easily a claim of privilege might be used to sanction the arbitrary proceedings of ministers and Parliament, even when a fundamental right of the subject was concerned." *Wittke,* at p. 127. See also *Alexander Murray's Case,* 1 Wils. 299; *Regina* v. *Paty,* 2 Ld. Raym. 1105; *Case of Captain Streater,* 5 How. St. Tr. 336; *Sir Robert Pyle's Case,* 5 How. St. Tr. 948.

[42] *Wittke,* at p. 199. See also *Brass Crosby's Case,* 3 Wils. 199; *Regina* v. *Paty,* 2 Ld. Raym. 1105.

of the parliamentary immunities to members' servants "the abuse of privilege became intolerable".[43] By the eighteenth century "a corrupt, time-serving Parliament had learned to use the law of privilege to punish personal enemies . . . privilege became a real danger to individual liberty . . . the common law guarantees of the subject's rights and liberties proved of no effect when matched with a Parliament, determined to vindicate its claim of privilege."[44]

In reality England had been thrown into a constitutional crisis of grave dimensions. A seemingly irreconcilable contradiction had emerged over the years between the original function of the parliamentary privilege in protecting the independence of the legislature against the Crown, and the subsequent utilization of the legislative privilege as a means of perpetuating a parliamentary tyranny destructive of the rights of individual subjects. The ultimate resolution in the English system of this constitutional dilemma lay in the slow evolution of legal definitions and limitations upon the exercise of legislative privilege, enforceable by the courts of law, which would at the same time protect the essential legislative right to freedom of speech while safeguarding the fundamental liberties of individuals.[45] The law of the legislative privilege which has emerged in England reflects this effort to resolve the contradiction

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[43] *Wittke*, at p. 200. See also *Burdett* v. *Colman*, 14 East. 163; *Mr. Coke's Servant*, 1 Hats. Pr. 112; *Lark's Case*, 1 Hats. Pr. 18.

[44] *Wittke*, at p. 201.

[45] As Professor Wittke comments: "Occasionally someone caught a faint glimpse of the ultimate solution, but it took years to realize it in practice. Gradually it must have dawned upon men's minds to inquire why privilege alone should remain unlimited and undefined by law, long after the royal prerogative and the rights and liberties of the people had become fixed and circumscribed by acts of Parliament and decisions of the common law courts." *Wittke*, at p. 203. See also *Prynne, Brief Register*, IV, 695; *Ashby* v. *White*, 2 Ld. Raym. 938, 950.

engendered by the two sides to the history of the concept, through restricting the immunities to those situations which truly serve the end of protecting the freedom of speech and independence of the legislators while rejecting all efforts to utilize the privilege to immunize actions destructive of the liberties of citizens.

The first great expression of what was ultimately to be the English judicial resolution of the historical dilemma was the landmark opinion of Lord Holt in the case of *Ashby* v. *White*, 2 Lord Raymond 938 at 950 (1700). This opinion has been called "the first clear exposition of what might be termed the modern view of parliamentary privilege."[46]

In this opinion Lord Holt maintained that a dividing line must be drawn by the courts of law between the legitimate claims of parliamentary privilege and the fundamental rights of citizens to secure reparations for injuries received by applying for relief to the courts of law. Lord Holt announced what was then a new doctrine, that there are certain fundamental rights of the subject, guaranteed under the common law which cannot be abridged or altered even under the claim of parliamentary privilege. Furthermore, Lord Holt argued that anything incompatible with the rights of the people or anything depriving them of their basic right to secure a remedy for injuries received from a court of law could not be a privilege of the Parliament.[47]

This incisive analysis of Lord Holt was not to become the solution adopted by the English system in reconciling

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[46] *Wittke, supra*, at p. 64.

[47] See *Wittke, supra*, at pp. 64-5 for a discussion of Chief Justice Holt's opinion in *Ashby* v. *White, supra*. Lord Holt's opinion in *Regina* v. *Paty, supra*, is equally interesting. See, for example, his statement at 2 Ld. Ravm. 1113-1114: "The privileges of the House of Commons are well known, and are founded upon the law of the land, and are nothing but the law. . . . And if they declare themselves to have privileges, which they have no legal claim to, the people of England will not be estopped by that declaration."

the two-sided experience of history with the operation of the parliamentary privilege until almost one hundred and fifty years later in the celebrated cases of *Stockdale* v. *Hansard* (1837-1842).[48]

These cases, involving a claim of privileged immunity from a suit for libel by the public printer, established the following principles of law which reflected Lord Holt's concern with adjusting the true privileges of the House with the necessity for preserving the fundamental liberties of the citizen:

1. The courts of law have the duty and responsibility of defining the limits and scope of asserted legislative privileges and immunities. The concept that the Parliament alone has the power to define its own privileges would concede to the legislature a limitless and arbitrary power over the rights of individuals, for as Lord Chief Justice Denman said in his opinion, "in truth, no practical difference can be drawn between the right to sanction all things under the name of privilege, and the right to sanction all things whatever, by merely ordering them done."[49]

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[48] Professor Wittke explains the long period before the acceptance of Lord Holt's analysis of the parliamentary privilege in the following way: "Between 1701 and 1837, Holt's theory was disregarded completely, save in the arguments of a few able lawyers, and was never advanced by Parliament or the courts during this period as a real solution for the problems of privilege and its relation to the common law. These years include the reign of the Whig Oligarchy, still resting serenely on the prestige which the Glorious Revolution had brought them. Parliament was their stronghold, and they clung tenaciously to their power. It was unreasonable to expect them to support a principle that would rob them of their arbitrary powers in Parliament, and bring them under the restraints of the law. Privilege of Parliament proved one of the convenient aids in maintaining and prolonging an autocratic rule." Wittke at p. 205.

[49] *Stockdale* v. *Hansard*, 9 AD. & E. 1 at 147.

2. The legitimate scope of the legislative privilege of immunity must be tested by whether the act sought to be immunized "is indispensably necessary for the performance of the duty they are employed in, and also that it has been uniformly allowed."[50] Or, as Justice Coleridge placed it, the privilege of legislative immunity is permitted only where required "for the effective discharge of those duties which by the Constitution are cast upon the House of Commons."[51] *Cf. Tenney* v. *Brandhove, Kilbourn* v. *Thompson, supra.*

3. No legislative immunity attaches to a "known and undoubted breach of the law," for neither "House of Parliament can authorize any person to commit with impunity a known and undoubted breach of the law".[52] While members of the House may not be held liable "on account of the orders issued by them as such members" *cf. Kilbourn* v. *Thompson, supra,* any person whosoever participating in the illegal actions is liable in an action at law for damages, because "there is no wrong without a remedy; and where can the remedy be but by action in a Court of Law against those who have done the injury?"[53]

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[50] *Stockdale* v. *Hansard,* 9 AD. & E. 1 at 240.

[51] *Stockdale* v. *Hansard,* 9 AD. & E. 1 at 218.

[52] *Stockdale* v. *Hansard,* 9 AD. & E. 1 at 188.

[53] The full discussion of Justice Patteson on this question is instructive in respect to the issues involved in the present case:

> "With respect to the first question, it has not been contended in argument that either House of Parliament can authorize any person to commit with impunity a known and undoubted breach of the law. Extravagant cases have been sometimes put, illustrating the impossibility of maintaining such a proposition. It has been answered truly, that it is not decent or respectful to those high assemblies to suppose that such extravagant cases should arise. But less extravagant cases have arisen in which

Applying these principles to the case at bar the English court held that the parliamentary immunity did not apply to those individuals who published the alleged libelous ma-

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both Houses of Parliament have confessedly exceeded their powers in punishing persons for trespasses on the lands of members, and other matters wholly without their jurisdiction, but which they have treated as questions of privilege. And, though no instance has been cited of any action having been brought, but, on the contrary, the persons proceeded against have very commonly submitted to the illegal treatment they have met with, yet surely the maxim of law must apply, viz. that there is no wrong without a remedy; and where can the remedy be but by action in a Court of Law against those who have done the injury? If it be once conceded that either House of Parliament can make an illegal order, it must necessarily follow that the party wronged may have redress against those who carry such illegal order into effect; and how can he have such redress but by action at law? Great difficulties may undoubtedly arise in distinguishing between acts done in the House, and out of the House under orders given in the House, and in determining against whom such action would lie. It is clear that no action can be maintained for anything said or done by a member of either House in the House: and the individual members composing the House of Commons, whether it be a Court of Record or not, may, like other members of a Court of Record, be free from personal liability on account of the orders issued by them as such members. Yet, if the orders themselves be illegal, and not merely erroneous, upon no principle known to the laws of this country can those who carry them into effect justify under them. A servant cannot shelter himself under the illegal orders of his master. Nor could an officer under the illegal orders of a magistrate, until the Legislature interposed and enabled him to do so. The mere circumstance, therefore, that the act complained of was done under the order and authority of the House of Commons, cannot of itself excuse the act, if it be in its nature illegal; and it is necessary, in answer to an action for the commission of such illegal act, to show, not only the authority under which it was done, but the power and right of the House of Commons to give such authority." 9 AD. & E. 1 at 188-190.

terials, although the printing had in fact been ordered by the Commons itself.[54]

It has been said that as a result of the almost five centuries of conflict, culminating in the *Stockdale* v. *Hansard* cases, "England now has an all-embracing law of the land which protects the subject and the just privileges of Parliament as well" and that "Parliamentary privilege exists today only under the rules and limitations of the law."[55] The ultimate English judicial resolution of the limits and scope of legislative immunity reflected in the *Stockdale* v. *Hansard* cases which protect the fundamental liberties of the citizen from the abuses of an arbitrary legislative tyranny, is in the deepest sense of the word also protective of the legislative privilege itself. For as Justice Coleridge stated in concluding his opinion in *Stockdale* v. *Hansard*:

> "The privileges of the House are my own privileges, the privileges of every citizen in the land. I tender them as dearly as any member possibly can: and, so far from considering the judgment we pronounce as invading them, I think that by setting them on the foundation of reason, and limiting them by the fences of the law, we do all that in us lies to

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[54] In the case of *Rex* v. *Creevy*, 1 M. & S. 273, the defendant was a member of Parliament who caused to be circulated outside of Parliament a publication originally printed for Commons. The copies circulated contained matter injurious to the character of an individual. The defendant was held accountable by a jury for publication of the libelous material even though he would not have been required to answer for it had he simply made the statements in Commons and not caused them to be widely publicized and circulated. See also *Long* v. *Ansell*, 293 US 76 (1934). In that case, a Senator of the United States was charged with publishing, in the District of Columbia, libelous articles which he distributed widely. This Court held that the Senator was not immune from service of process to answer for his conduct in a civil defamation action. See also *McGovern* v. *Martz*, 182 F. Supp. 343 (DC DC 1960), (no absolute privilege for republication of material inserted in Congressional Record).

[55] *Wittke* at pp. 206, 207.

secure them from invasion, and root them in the affections of the people."[56]

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The English history of legislative immunity and the ultimate English judicial resolution of the complex and contradictory influences involved in the emergence of the parliamentary privilege are of course deeply related to the "presuppositions of our political history" critical to an understanding of the meaning and purpose of the Speech or Debate Clause. *Tenney* v. *Brandhove,* 341 U.S. at 372.[57] We would suggest that the limitations and boundaries to the concept of legislative immunity which this Court has emphasized from *Kilbourn* to *Johnson* reflect the lessons of history—that the legislative immunity must not be permitted ever again to become "the greatest oppressor of the subject's liberty", or a "screen for the basest oppression."[58] The firm rejection by this Court of respondents' claim of legislative immunity for their participation in a conspiracy with state officials to bring about illegal raids, arrests and the seizure of the property of citizens would, in the words of Justice Coleridge in *Stockdale* v. *Hansard,* firmly preserve the true purpose of the privileges embedded in the Speech or Debate Clause "and root them in the affections of the people" by "setting them on the foundation of reason, and limiting them by the fences of the law".

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[56] *Stockdale* v. *Hansard,* 9 AD. & E. 1 at 243.

[57] See the comment of Mr. Justice Miller in *Kilbourn* that the decision in *Stockdale* v. *Hansard* is a "sound statement of the legal effect of the Bill of Rights and of the parliamentary law of England" and that "it may be reasonably inferred that the framers of the Constitution meant the same thing by the use of language borrowed from that source". 103 US at 202.

[58] *Wittke, supra* at p. 15.

3. The Solicitor-General Appears to Agree That No Immunity Would Protect Respondents as Parties to the Conspiracy Affecting the October 4 Raids.

It is perfectly clear that under the controlling decisions of this Court, the Speech or Debate Clause, as interpreted within the context of the "presuppositions of our political history", *Tenney* v. *Brandhove*, 341 U.S. at 372, does not permit a mantle of immunity to be placed over the complained of acts of the respondents. In fact, in this Court, the Solicitor-General does not suggest, contrary to the position of the respondents below, that the charge of participation in the conspiracy to effectuate the illegal raids and seizures of October 4th is protected by any concept of legislative immunity. Brief for Respondents in Opposition, pages 10, 11.

In the Court of Appeals, the respondents argued alternatively that (1) the petitioners had failed to put forward a serious claim that the respondents were parties to a knowing concert of action with the state officials (R. 105), and (2) that even if the respondents "did participate or conspire in the acquisition of the records by means of the search and seizure . . . the doctrine of immunity would be an absolute defense", Brief for Appellees below, page 35. The Court of Appeals rejected respondents' first contention, stating directly, "were only the former involved, we might have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial" (R. 105), and rested its affirmance wholly on the assumption that the concept of legislative immunity protected respondents from accountability in damages for the actions charged to them in the complaint (R. 105).

In this Court, however, the Solicitor-General appears to have abandoned any contention that the Speech or Debate Clause could conceivably immunize the respondents from the charge of participation in the conspiracy with the state officials to bring about the October 4th raids, arrests, searches and seizures. The Solicitor-General's sole re-

sponse to the charge of participation in the conspiracy concerning the October 4th raids now appears to be a contention that the Court of Appeals erred when it found that "we might have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial", Brief for Respondents in Opposition, pages 9, 10, see in particular footnote 4.[59] The Solicitor does not urge, as the respondents did below, that even if there were disputed issues of fact as to whether they "were parties to a knowing concert of action with the state officials" (R. 105), legislative immunity would insulate such conduct from scrutiny in a court of law. He prefers instead to rest his argument in respect to the charge of participation in the conspiracy solely upon an effort to persuade this Court to overturn the Court of Appeals' factual determination that on the record with regard to whether respondents were parties to a "knowing concert of action with the state officials" there are "disputed issues of fact requiring exploration and resolution by means of a trial" (R. 105).[60] Thus the

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[59] The Solicitor-General here states, "With regard to respondents' alleged participation in a conspiracy, the court of appeals found that 'we might have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial' (Pet. App. 5a). As we show, however, petitioners' failure either to contradict respondents' affidavits on this score or to explain their failure to do so fully justified the district court's action in granting summary judgment under Rule 56, F.R. Civ. P."

[60] The apparent concession that there is no issue of legislative immunity in respect to the charge of participation in the conspiracy concerning the Oct. 4th raids is highlighted by the Solicitor's careful statement that "Finally, to the extent that petitioners' complaint may have rested, *not on respondent's alleged complicity in the October 4 searches*, but on the fact that respondents executed subpoenas for the seized material without prior authorization by the subcommittee, we submit that the court of appeals correctly held that the respondents' conduct was undertaken in their official capacity and provides no basis for recovery in tort" (emphasis added). Brief for Respondents in Opposition, pp. 10, 11.

Solicitor appears to suggest that in respect to the charge of "alleged complicity in the October 4 searches" there is no issue of immunity, and that this question may arise only to the extent that that complaint rests *"not on"* this complicity, but on the use of the unauthorized subpoenas. Brief for Respondents in Opposition, pages 10, 11. We discuss subsequently why the use of the unauthorized subpoenas by the respondents may not invoke any, even limited, immunity response. See pages 70 *et seq., infra. Cf. United States* v. *Johnson, supra.* But the simple fact of the matter is that the complaint *does* rest upon a charge of knowing concert of action with the state officials in respect to the October 4th searches (R. 2-12), and the Court of Appeals *has* found that there are disputed material facts as to respondents' participation in this knowing concert of action requiring a trial (R. 105). Accordingly, it would seem that the Solicitor's only defense in this Court to the main thrust of the complaint appears to be the extraordinary suggestion that the Court of Appeals' determination that there are disputed issues of fact requiring exploration and resolution by trial ought to be overturned by this Court. We discuss the propriety and soundness of this suggestion in Point III, *infra,* at pages 95 *et. seq.,* where we indicate that the factual conclusion of the Court of Appeals as to the existence of disputed issues requiring resolution by trial is fully supported on the record. However, it would appear that at this stage of the litigation, the Solicitor-General now seems to agree that no mantle of immunity can attach to the actions of respondents who stand charged with participating, together with state officials, in a conspiracy under color of state law to plan and contrive illegal raids,

arrests, searches and seizures, in violation of the Fourth Amendment. *Cf. Wheeldin* v. *Wheeler*, 373 U.S. 647 (1963).[61]

4. The Recent Decisions in the Fifth Circuit in the Louisiana Branch of This Litigation Support the Conclusion That No Immunity Attaches to Respondents As Parties to the Conspiracy to Bring About the October 4 Raids.

The recent decision by the Court of Appeals for the Fifth Circuit, *Pfister* v. *Arceneaux* (No. 22562, Nov. 14, 1966), Appendix E to this Brief, reflects the same perceptions which underlie the apparent agreement of the Solicitor-General in this Court—that no mantle of legislative immunity may be placed over a charged participation in a conspiracy to carry through illegal raids, arrests, searches and seizures.

The opinion of Circuit Judge Wisdom focuses on the central problem in the present case. The third-party defendants in the Louisiana branch of this litigation (see Statement of the Case, p. 21, *supra*) were members of the Louisiana Joint Legislative Committee. They sought dismissal of or judgment upon the third-party complaint on the theory that their activities as Committee members were all protected by the doctrine of legislative immunity, relying upon this Court's decision in *Tenney* v. *Brandhove*, *supra*. Judge Wisdom found for the Circuit Court that there was a genuine issue as to a material fact present in the record which would preclude summary judgment. Appendix E. This issue of fact was relevant to whether the Committee members were involved in any way in the planning, preparation or operation of the October 4th

[61] In *Wheeldin*, the Solicitor-General conceded in this Court that the respondent Wheeler, a staff investigator for the House Committee on Un-American Activities charged with tort liability for damages alleged to flow from the service of an unauthorized subpoena, was "not acting sufficiently within the scope of his authority to bring the doctrine [immunity] into play". 373 US at 647. See discussion *infra* at pp. 71 *et. seq.*

raids.[62] In turn, Judge Wisdom pointed out that this question of fact was directly relevant to the central issue of legislative immunity pleaded by the third-party defendants, for as Judge Wisdom emphasized, this "has a serious bearing on the question as to whether Pfister and the other members of the Committee were 'acting in the sphere of *legitimate* legislative activity' " (emphasis added by Judge Wisdom). Thus the conclusion of the Circuit Court was clear. If there is a disputed issue as to participation in the illegal October 4th raids requiring resolution by trial, there is inevitably a disputed issue as to the propriety of a defense of legislative immunity, since such a defense is available only where the legislators are acting in the sphere of *legitimate* legislative activity. The inference of the court is obvious. Participation in illegal raids, arrests and seizures in violation of the Fourth Amendment is simply not "legitimate" legislative activity.

This is a conclusion which, as we have seen, is impelled not only by the decisions of this Court, not only by the "suppositions of our political history", *Tenney* v. *Brandhove*, 341 U.S. at 372, but by the most fundamental axioms of our system of government. The command of the Fourth Amendment reflects considerations which go to the heart of a system of ordered law. This last term the Court saw fit to remind us of these words of Mr. Justice Brandeis in *Olmstead* v. *United States*:

> "Decency, security and liberty alike demand that government officials shall be subject to the same rules of conduct that are commands to citizens. In

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[62] The contested issue of fact as to the Committee members included the accuracy of their statements that "they did not authorize the raids and in fact knew nothing about them before they were carried out". Appendix E. The court found that there was sufficient doubt on this question to foreclose summary judgment, citing *National Screen Service Corp.* v. *Poster Exchange, Inc.*, 5 Cir. 1962, 305 F.2d 647, 651, and *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464.

> a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously", 277 U.S. 438, 485. See *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

If this is the thrust of the Fourth Amendment, it is of course inconceivable that participation by a legislator in the flagrant violation of the Amendment could ever, in our system of government, be considered to be "legitimate" legislative activity. Any support to such an extraordinary proposition would undermine the first principles of the Republic that this is "a government of laws and not of men". *Marbury* v. *Madison*, 1 Cranch 137. If an American court were ever to say that participation in the violation of the commands of this Amendment was, in any sense at all, a "legitimate" legislative activity, then in Mr. Justice Brandeis warning words the very "existence of the government will be imperilled", 277 U.S. at 485.

These considerations lie behind the recent decision of the Fifth Circuit in *Pfister* v. *Arceneaux* and, we suggest, may well lie behind the Solicitor's apparent agreement that no immunity may attach to a claim of participation in a conspiracy to contrive raids and seizures in violation of the Fourth Amendment. The conclusions of the Fifth Circuit are of course highly relevant and persuasive in the present case. Here, as in the Louisiana branch of the litigation, the Court of Appeals has also found "difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial" as to whether the respondents were "parties to a knowing concert of action with the state officials" (R. 105). And here, as in *Pfister* v. *Arceneaux*, the conclusion is likewise inescapable that this has "a serious bearing on the question whether [the respondents] were 'acting in the sphere of *legitimate* legislative activity', which would entitle them to immunity", Appendix E. This conclusion is inescapable because the

inference underlying the conclusion is unanswerable under the premises of our system of government—that participation in illegal raids, arrests, searches and seizures in violation of the Fourth Amendment may never be characterized for any purpose as "legitimate" legislative activity. As in *Pfister* v. *Arceneaux*, these respondents should be required to stand trial on the charges that they were parties to a knowing concert of action with state officials to instigate and carry through the illegal raids, searches and seizures of October 4th.

5. Respondents' Unauthorized Use of the Subpoena Power in the Course of the Conspiracy Does Not Justify the Invocation of the Doctrine of Legislative Immunity.

The Solicitor-General suggests that to the extent that the complaint does not rest upon "respondent's alleged complicity in the October 4 searches," but "on the fact that respondents executed subpoenas for the seized material without specific prior authorization by the Subcommittee" this use of the subpoena power "was undertaken in their official capacity and provided no basis for recovery in tort" Brief for Respondents in Opposition, pp. 10, 11.[63] This suggestion is in direct conflict with the previous Solicitor-

[63] It should be pointed out as a threshold consideration that even if the Solicitor-General's suggestion was sound—that immunity attaches in some way to the use of the unauthorized subpoenas, see *contra, Wheeldin* v. *Wheeler*, 373 U.S. 656, [concession of Solicitor-General that under allegations of the utilization of an unauthorized House Committee on Un-American Activities subpoena a respondent "was not acting sufficiently within the scope of his authority to bring the doctrine into play", 373 U.S. at 647, and Brief for Respondents in the Supreme Court, *Wheeldin* v. *Wheeler*, at p. 31] summary judgment would have been erroneous since at best under *United States* v. *Johnson, supra*, the trial of the conspiracy charge would have had to have been held, "purged" only of elements "offensive to the Speech or Debate Clause." See discussion, *supra*, at pp. 39 *et seq.*

General's own concession before the Court in *Wheeldin* v. *Wheeler*, 373 U.S. 656 (1963), in an identical situation, and is contrary to the teaching of recent decisions of this Court affirming the fundamental importance of minimal requirements of authorization in Congressional investigative activities in the areas of the protected liberties of the people. *Cf. Gojack* v. *United States*, 384 U.S. 702, (1966).

(a) In *Wheeldin* v. *Wheeler*, 373 U. S. 656, the Solicitor-General took the position before this Court that the unauthorized use of the subpoena power by an investigator for the House Committee on Un-American Activities required a concession by him that the respondent committee investigator was "not acting sufficiently within the scope of his authority to bring the [immunity] doctrine into play" 373 U. S. at 647. This concession by the Solicitor-General in *Wheeldin* would seem to be dispositive here of any contention that the unauthorized use of the subpoena power by the respondents was in any way immunized.

Wheeldin involved an action for damages for injuries caused to a petitioner by the service of a House Committee on Un-American Activities subpoena upon him. The complaint alleged that the subponea was signed in blank by the Committee Chairman and that its service upon the petitioner was never authorized by the Committee. 373 U. S. at 648. The Court of Appeals sustained the District Court's dismissal of the action on the sole ground that the respondent was protected by the immunity doctrine. However, in this Court, the Solicitor-General conceded that under these allegations the respondent was "not acting sufficiently within the scope of his authority to bring the doctrine into play". 373 U. S. at 647. Both the opinion of the Court by Mr. Justice Douglas, 373 U. S. at 651, and the dissenting opinion of Mr. Justice Brennan, joined by the Chief Justice and Mr. Justice Black, 373 U. S. at 653, agreed with the Solicitor-General that the immunity doctrine could not be invoked under these allegations.

The *Wheeldin* facts concerning the use of the subpoena power are strikingly identical to the present record. The October 4th subpoenas were signed in blank by the Chairman of the Committee (R. 32). They were filled in and issued by the respondents without the knowledge of or authorization of the Subcommittee or the full Committee (R. 33, 34). The Solicitor General here concedes that these subpoenas "had not been authorized by the Subcommittee prior to the actions taken by respondents." Brief for Respondents in Opposition, p. 8. There is no suggestion in this record that the Subcommittee or the Committee ever "attempted to delegate the Committee's subpoena power" to the respondents, cf. 373 U. S. at 648, even if such a delegation had been permitted by the Committee's own rules.[64] The parallel to *Wheeldin* is striking.[65]

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[64] Subpoenas issued by a single member of the Subcommittee on Internal Security without the prior authorization of the Subcommittee are null and void as violative of the Committee's own rules, even if the single member issuing the subpoena is the Chairman. *Liveright* v. *United States*, 347 F. 2d 473 (C.A. D.C. 1965); *Shelton* v. *United States*, 327 F. 2d 601 (C.A. D.C. 1963). These recent decisions of the Court of Appeals for the District of Columbia squarely hold that subpoenas issued by the Internal Security Subcommittee must be authorized by the full Subcommittee. The Court of Appeals holds in *Liveright* that a subpoena issued by respondent Eastland, as Chairman of the Subcommittee, after consultation with the Chief Counsel of the Committee, is invalid as violative of the Committee's own rules. The Court points out that the Committee rule requiring all decisions on subpoenas to be made by the Subcommittee and not an individual member, "served to protect the right of all persons to be free from unnecessary invasions of their privacy" 347 F. 2d at 475. The Court of Appeals relied upon its own previous decision in *Shelton*, and this Court's decision in *Yellin* v. *United States*, 374 U.S. 109. In *Shelton* the Court of Appeals referred to this Court's decision in *Cudahy Packing Co. of Louisiana* v. *Holland*, 315 U.S. 357, 363, stating that the authority "to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use."

[65] The lower court suggests that Wheeldin is inapposite here because "unlike *Wheeldin*, the record before us shows without dispute

The conclusion is compelling that the unauthorized use of the subpoena power here by the respondents was, as in *Wheeldin*, "not . . . . sufficiently within the scope of their authority" to bring the immunity doctrine into play. Or, to put it in terms more familiar to the vocabulary of the legislative privilege, the utilization of admittedly unauthorized subpoenas is not "legitimate legislative activity." *Tenney* v. *Brandhove, supra.*[66]

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that the subpoena was expressly authorized in the first instance by the Chairman of the legislative committee . . ." (R. 107). Apart from the fact that the Chairman had no authority to authorize the subpoena, *Shelton* v. *United States, Liveright* v. *United States,* both *supra,* in *Wheeldin* it is quite clear that the subpoena was not only signed in blank by the Chairman, but that the Chairman had seen a list of prospective subpoenaees in advance and had agreed to the respondents issuing subpoenas to those named. Reply Brief for Petitioners in the Supreme Court, pp. 10-11. Moreover, at the contempt trial of Wheeldin, the District Court found that the Chairman had, in fact, directed the respondent Wheeler to subpoena Wheeldin. Brief for Respondents in the Supreme Court, at p. 23.

[66] The Court's decision in *Wheeldin* is instructive in other respects here. The majority opinion of Mr. Justice Douglas, after disposing of the immunity issue and asserting the propriety of federal jurisdiction under *Bell* v. *Hood,* 327 U.S. 678, held that no federal cause of action was stated since (1) the "facts alleged do not establish a violation of the Fourth Amendment", 373 U.S. at 650, and (2) the Civil Rights Acts were not available since respondents were not acting "under color" of state law. Here, of course, the complaint clearly states facts establishing a violation of the Fourth Amendment, the violation having already been found as a matter of law by the Louisiana state courts, see Statement of Facts, *supra* at pp. 8, 9 and the respondents are charged with acting in concert with state officials under color of state law. *Cf. United States* v. *Price, supra.* The dissenting Justices in *Wheeldin,* Mr. Justice Brennan, the Chief Justice and Mr. Justice Black, would have sustained a federal cause of action in tort even absent classic Fourth Amendment allegations. 373 U.S. at 653. It would seem that had the *Wheeldin* complaint adequately alleged a Fourth Amendment violation, the Court would have sustained the complaint.

(b) Both the Solicitor-General and the lower court attempt to suggest that the Subcommittee's subsequent resolution of November 14th, inserting the seized material "into the record of the Subcommittee" (R. 36), in some manner serves as a retroactive ratification of the subpoenas sufficient to bring the unauthorized use of the subpoena power back within "the sphere of legitimate legislative activity." Brief for Respondents in Opposition, at p. 11.

In the first place, the so-called resolution of November 14 very carefully does not even purport to "ratify" or "approve" the issuance of the October 4 subpoenas. It merely directs that the seized materials be inserted in the record, photostated and "returned promptly" to the Louisiana officials (R. 36, 37). Furthermore, there is even some question in the record about the existence of any such formal Subcommittee action on November 14.[67] But in

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[67] At the hearing on the motion for summary judgment petitioners moved, pursuant to Rule 56 subd. (f) of the Federal Rules of Civil Procedure for "a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had" based upon information appearing in the press on February 6, 1965, that Senator Kenneth B. Keating (R., N.Y.), a member of the Internal Security Subcommittee had recently sent a letter to respondent Eastland protesting any subpoena of the SCEF records and saying that "no such action should be taken without full discussion of the Subcommittee" (R. 30, 31). At the hearing itself before the District Court, petitioners submitted an affidavit to the court in support of the motion, pursuant to Rule 56(f), for a continuance to permit a deposition to be taken of or an affidavit to be obtained from Senator Keating. The affidavit of counsel had attached to it a copy of Senator Keating's letter of January 30, 1964 sent to respondent Eastland, referred to in the newspaper story of February 6 (R. 31). The District Court refused to entertain the affidavit with the attached letter of Senator Keating and accordingly this second affidavit and the Senator's letter are not a part of the formal record in this case. In light of the great reliance now placed by the respondents upon the purported resolution of November 14, it would seem that it was clear error for the District Court to refuse to allow Senator Keating's letter into the record, or permit time to take his deposition.

any event, it is now perfectly clear that retroactive authorization of an investigation or a subpoena issued by an investigative committee will not be tolerated. *Gojack* v. *United States,* 384 U. S. 702, 715, fn. 12; *United States* v. *Rumely,* 345 U. S. 41, 48; *Shelton* v. *United States,* 327 F. 2d 601 (C. A. D. C. 1963). In *Gojack* v. *United States,* this Court only last Term rejected a contention that subsequent actions taken by the full House Committe on Un-American Activities could be treated as "retroactive authorization of the investigation and definition of the delegated authority" 384 U. S. at 715.[68] See also *United States* v. *Rumely,* 345 U. S. at 48. In *Shelton* v. *United States, supra,* the Court of Appeals for this District of Columbia, in an opinion by Circuit Judge Wright, specifically refused to permit a retroactive authorization of a subpoena issued without authorization by the Senate Subcommittee on Internal Security. Judge Wright's conclusion in rejecting the Government's argument that the unauthorized subpoena had been ratified by later Committee action, is directly relevant here:

> "As its final argument on this point, the Government says that, in any event, the Subcommittee, by its presence at the time Shelton refused to answer the questions, ratified his appearance as a witness. We do not agree. Shelton had a right under the Subcommittee charter to have the Subcommittee responsibly consider whether or not he should be

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[68] Mr. Justice Fortas put the question this way in his opinion for the Court in *Gojack*:

> "The action of the full Committee in reporting petitioner's contempt to the House, and the House's action in certifying the contempt to the United States Attorney for prosecution, cannot be taken as retroactive authorization of the investigation and definition of the delegated authorization of the investigation and definition of the delegated authority. Petitioner's 'duty to answer must be judged as of the time of his refusal.' *United States* v. *Rumely,* 345 U.S. 41, 48, 73 S. Ct. 543, 547."

> subpoenaed before the subpoena issued. Shelton's rights were abridged when the subpoena was issued without Subcommittee authorization. Cf. Christoffel v. United States, 338 U.S. 84, 69 S. Ct. 1447, 93 L. Ed. 1826 (1949)."

The unauthorized use of the subpoena power at the time of its use by these respondents was admittedly not "legitimate legislative activity," *Tenney* v. *Brandhove, supra,* and cannot any more be "retroactively" transformed into "legitimate legislative activity" than could the subpoena of Gojack in an unauthorized investigation have been validated by a "retroactive authorization," *Gojack* v. *United States,* 384 U. S. 715.[69]

(c) The sharp rejection of any concept of retroactive authorization restated in *Gojack* this last Term, reflects the deepening concern of this Court in recent years to protect the fundamental liberties of citizens from the encroachments of unauthorized and uncontrolled legislative investigations enforced by compulsory process. The lower court treats the concededly unauthorized use of the subpoena power by the respondents as if it were a mere technicality to be quickly cured by some generalized later action of the Committee. In the opinion of the lower court, "acting first and receiving authorization later, does not, under the facts of this case, put their actions beyond the pale of

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[69] The requirement of full Committee action in legislative investigations serves important policy considerations. See, for example, *Report on Congressional Investigations* by Special Committee on Individual Rights of the American Bar Association (1954, p. 27):

> "We are dealing with investigations by committees in the interests of Congress and the nation, not investigations by individuals. Abdication by the committee in favor of its chairman blurs this whole concept, encourages arbitrary action, and allows the public to blame Congress for the errors thus permitted with its authority and has proved to be undesirable. Committee responsibility is essential and it can be maintained only if the majority of the committee join in making the principal decisions."

official legislative activity, at least for purposes of the immunity doctrine", (R. 107). But this conclusion is wholly inconsistent with the fundamental concerns underlying the repeated insistence of this Court that the use of compulsory process to enforce legislative investigative activity in the protected areas of the First Amendment must be carefully circumscribed and controlled by minimal requirements of valid authorization. As the Chief Justice wrote in *Sweezy* v. *New Hampshire,* 354 U. S. 234: "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas of freedom of speech or press, freedom of political association, and freedom of communication of ideas . . ." 354 U. S. at 245.

This firm insistence upon a showing of clear authorization as a minimal protection against the abuses of an investigating power which functions as a "roving commission", *Gojack* v. *United States,* 384 U. S. at 715, "probing at will without relation to existing need", *DeGregory* v. *Attorney General of New Hampshire,* 383 U. S. 825, is at the core of this Court's decisions from *Watkins* v. *United States,* 354 U. S. 200, to *Gojack* v. *United States,* this last Term. The requirement of authorization prior to the intrusion of compulsory process into the sensitive areas of the First Amendment is no minor technical question. It goes to the very heart of "the responsibility of the Congress; in the first instance, to insure that compulsory process is used only in furtherance of a legislative purpose" *Watkins* v. *United States,* 354 U. S. at 201. It is "an especially vital consideration in assuring respect for constitutional liberties", *Watkins* v. *United States,* 354 U. S. at 205.

The understanding that the requirement of authorization for compulsory process is a fundamental minimal barrier against legislative intrusion into constitutionally in-

sulated areas of the liberties of citizens underlies the Court's opinion in *Watkins* v. *United States, supra.* The Court, in *Watkins,* recognizing that "abuses of the investigative process may imperceptibly lead to abridgement of protected freedoms", 354 U. S. at 197, resulting in a "ruthless exposure of private lives in order to gather data that is neither desired by the Congress nor useful to it", 354 U. S. at 205, insisted as a first principle, "an essential premise", that investigations enforced by compulsory process be specifically authorized by the Congress and the Committee. This insistence rests, the Chief Justice pointed out, upon the recognition that "it is the responsibility of the Congress, in the first instance, to insure that compulsory process is used only in furtherance of a legislative purpose" 354 U. S. at 201. Otherwise the investigatory power can be "inflated into a general power to expose where the predominant result can only be an invasion of the private rights of individuals" 354 U. S. at 200. Such an exercise of the investigating power would be wholly beyond the constitutional power of the legislature since "there is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress" 354 U. S. at 197. As the Court placed the question in broad perspective, "Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible" 354 U. S. at 197. Cf. *Gojack* v. *United States,* 384 U. S. at 711, fn. 9.

The insistence upon authorization as a precondition to the utilization of compulsory process in aid of the investigative power thus places upon the Congress the first responsibility of insuring that this utilization of compulsory process in aid of the investigatory power remains within the

confines of lawful, constitutional legislative power. In short, the requirement of authorization places upon the Congress the responsibility of first drawing the line between "legitimate legislative activity", cf. *Tenney* v. *Brandhove,* 341 U. S. at 376, and activity wholly outside the sphere of its constitutional limitations. And, as the Court warned in *Watkins,* the consequences which flow from the failure to insist upon authorization in the use of compulsory process in these critical areas are "manifold" 354 U. S. at 204. Absence of specific authorization means that "in deciding what to do with the power that has been conferred upon them, members of the Committee may act pursuant to motives that seem to them to be the highest. Their decisions, nevertheless, can lead to ruthless exposure of private lives in order to gain data that is neither desired by the Congress nor useful to it" 354 U. S. at 205. But the vice of lack of authorization is even "more important and more fundamental than that" 354 U. S. at 205. Here, the Chief Justice focuses upon the very center of the problem. Lack of specific authorization for the use of compulsory process "insulates the House that has authorized the investigation from the witnesses who are subjected to the sanctions of compulsory process" 354 U. S. at 205. This results in "a wide gulf between the responsibility for the use of investigative power and the actual exercise of that power" 354 U. S. at 205. And as the Chief Justice points out, "this is an especially vital consideration in assuring respect for constitutional liberties" for "protected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need" 354 U. S. at 205.

The conclusions of the court in *Watkins* are most appropriate here. In words which apply directly to the suggestion of the lower court—that the unauthorized use of the subpoena power by these respondents remains "within the mainstream of legislative effort" (R. 107)—the Chief

Justice summed up in this way the critical importance of the requirement of proper authorization as a condition precedent to the utilization of compulsory process in the field of congressional investigations:

> "We are mindful of the complexities of modern government and the ample scope that must be left to the Congress as the sole constitutional depository of legislative power. Equally mindful are we of the indispensable function, in the exercise of that power, of congressional investigations. The conclusions we have reached in this case will not prevent the Congress, through its committees, from obtaining any information it needs for the proper fulfillment of its role in our scheme of government. The legislature is free to determine the kinds of data that should be collected. It is only those investigations that are conducted by use of compulsory process that give rise to a need to protect the rights of individuals against illegal encroachment. That protection can be readily achieved through procedures which prevent the separation of power from responsibility and which provide the constitutional requisites of fairness for witnesses. A measure of added care on the part of the House and the Senate in authorizing the use of compulsory process and by their committees in exercising that power would suffice.
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> "That is a small price to pay if it serves to uphold the principles of limited, constitutional government without constricting the power of the Congress to inform itself."
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> *Watkins* v. *United States,* 354 U. S. at 215.

In case after case this Court has rigorously insisted upon the central importance of the requirement of proper authorization as marking the outer boundaries of legislative power to utilize compulsory process in aid of its investigatory functions. See, for example, *United States* v. *Rumely,* 345 U. S. 41; *Sweezy* v. *New Hampshire,* 354 U. S.

234; *Russell* v. *United States,* 369 U. S. 749; *Gibson* v. *Florida Legislative Committee,* 372 U. S. 579; *Yellin* v. *United States,* 374 U. S. 109; *DeGregory* v. *Attorney General of New Hampshire,* 383 U. S. 825; *Gojack* v. *United States,* 384 U. S. 702.[70]

Only last Term, in *Gojack* v. *United States,* 384 U. S. 702, the Court once again emphasized that it will insist upon "specific authorization," 384 U. S. at 709, as a minimal outer boundary marking the limits of legitimate legislative investigative activity. And in concluding his opinion for the Court, Mr. Justice Fortas highlighted the fundamental nature of this insistence upon the requirement of authorization by adopting the warning words of District Judge Weinfeld in *United States* v. *Lamont,* 18 F. R. D. at 32, that "No committee of either the House or Senate, and no Senator and no Representative, is free on

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[70] It is clear that the requirement of proper authorization marks only the outer boundaries of the legitimate use of compulsory process to enforce legislative investigations which intrude on the area of the First Amendment. Even if the compulsory process is properly authorized by the legislature the fundamental question of the impact of the enforced inquiry upon the protections of the First Amendment remains for resolution. See, for example, *Gojack* v. *United States,* 384 U. S. 702, "since we decide the present case on other grounds, it is not necessary nor would it be appropriate to reach the constitutional question." *Cf. Gibson* v. *Florida Legislative Committee,* 372 U. S. 539, concurring opinions of Mr. Justice Douglas at 559, and Mr. Justice Black at 558. Here, the Court does not have to reach the question as to whether the respondents' use of the subpoena power, *even if properly authorized,* was a "legitimate legislative activity" within the meaning of *Tenney* v. *Brandhove, supra,* because of its impact upon protected associational activities, cf. *NAACP* v. *Alabama,* 357 U. S. 449; *Bates* v. *Little Rock,* 361 U. S. 516; *Louisiana* v. *NAACP,* 366 U. S. 293; *Gibson* v. *Florida Legislative Committee, supra,* since there is here a clear concession that the use of the subpoena power was unauthorized. See *supra,* at p. 63.

its or his own to conduct investigations unless authorized" 384 U. S. at 716.[71]

This requirement of authorization in the use of the subpoena power to enforce the investigatory functions of the legislature, particularly where the compulsory process touches the sensitive areas of the First Amendment, has been carefully constructed as a minimal outer boundary of legislative power. The enforcement of this boundary is required to "uphold the principles of limited, constitutional government". *Watkins* v. *United States,* 354 U. S. at 216. It would undermine these fundamental considerations to place a cloak of immunity over the charged activities of these respondents merely because, in the course of the illegal conspiracy they resorted to a wholly unauthorized use of compulsory process. The Speech or Debate Clause does not require a result so inconsistent with the demands of the First Amendment and the basic premises of a government of limited powers. The Clause protects only "legitimate legislative activities." *Tenney* v. *Brandhove,* 341 U. S. at 376. The unauthorized use of compulsory process to enforce investigatory activities which intrude upon the area of protected liberties is not a "legitimate" legislative activity. It is not a "technical" lapse on the part of the legislator. It is wholly beyond legislative power. *Watkins* v. *United States; Gojack* v. *United States.* No legitimate interest of the legislature is served by immunizing such conduct, cf. *United States* v. *Johnson, supra,* and the most fundamental objectives of our constitutional system call for the enforcement of legal remedies which will deter conduct so dangerous to the most precious liberties

[71] Certain of the basic constitutional considerations underlying these words, first discussed in *Watkins,* were restated recently by the Court in *DeGregory* v. *Attorney General of New Hampshire,* 383 U. S. 825: "But the First Amendment prevents the Government from using the power to investigate enforced by the contempt power to probe at will and without relation to existing need." See also *Gojack* v. *United States,* 384 U. S. at 711, fn. 9.

of the citizens—the rights of "uninhibited political expression as guaranteed to the general populace by the First and Fourteenth Amendments . . :" rights of "central importance to our political system." *United States* v. *Johnson,* 383 U. S. at 182, fn. 12. (Opinion of Mr. Justice Harlan for the Court.)

* * *

These respondents stand charged with participating with officials of the State of Louisiana in a conspiracy to utilize laws of that state to contrive raids, arrests and searches and seizures in violation of the Fourth Amendment for the purpose of intimidating and deterring the petitioners and other citizens from their efforts to enforce the guarantee of racial equality contained in the Equal Protection Clause. Both this Court, in *Dombrowski* v. *Pfister,* as well as the courts of Louisiana have emphasized the illegality of the October 4 raids. The lower court has held that the issue as to whether respondents were parties to a knowing concert of action with the state officials requires exploration and resolution by means of a trial. The Fifth Circuit has held that the state legislators charged with participation in the conspiracy must stand trial.

To hold under these circumstances that the Speech or Debate Clause nevertheless immunizes these respondents from any liability in a court of law would destroy the very premises upon which the Clause rests. Neither the decisions of this Court, the historical context out of which the privilege has emerged, nor the "presuppositions of our political history" which shape the Clause itself, require any such result. Once again this Court faces the necessity of "setting" the privileges embedded in the Speech or Debate Clause "on the foundation of reason, and limiting them by the fences of the law." *Stockdale* v. *Hansard, supra.* To immunize these respondents, a United States Senator and his assistant, from responsibility for their charged participation in a conspiracy, illegal under the laws of the

United States, to utilize state laws this Court has already struck down as violative of the Constitution, to arrange for the false arrest of citizens, for illegal raids and seizure of their property, for the purpose of deterring them from using the rights of press, speech and assembly to assist in the elimination of racial segregation and discrimination would raise the question as to whether any man, by virtue of his power, his status or his authority, is wholly above the law. This Court has firmly rejected any such suggestion from the earliest days of the Republic. The words of the Court in *Marbury* v. *Madison*, that "the Government of the United States has been emphatically termed a government of laws, and not of men" are in the last analysis the ultimate response to the claim that these respondents are not accountable in an American court of law for the conduct with which they here stand charged.

POINT TWO

No doctrine of immunity protects respondent Sourwine from liability under the cause of action for money damages.

1. Legislative Immunity is not available to Respondent Sourwine as an Employee of the Legislature.

Respondent Sourwine is the counsel for the Internal Security Subcommittee. He is not a member of Congress. The constitutional protection of the Speech or Debate Clause does not in any event extend to him. This precise question was settled by this Court in *Kilbourn* v. *Thompson*, *supra*. In *Kilbourn*, the action was for damages for false imprisonment. The defendants were several members of the House of Representatives and one John A. Thompson, Sergeant-at-Arms of the House. In upholding the immunity cast by the Speech or Debate Clause over the members of

the House, for reasons we have discussed in Point One, *supra*, the Court specifically and clearly refused to extend the immunity to the Sergeant-at-Arms, and directed that the judgment of dismissal must be reversed as to him and the case remanded for further proceedings. Thus the Court concluded in *Kilbourn*:

> "... we think the plea set up by those of defendants who were members of the House is a good defense, and the judgment of the court overruling the demurrer to it and giving judgment for those defendants will be affirmed. As to Thompson, the judgment will be reversed and the case remanded for further proceedings."
>
> 103 US at p. 205.[72]

The vitality of the *Kilbourn* insistence that the legislative immunity doctrine applies only to members of a legislature is evidenced in the Court's reaffirmation of this limitation in *Tenney* v. *Brandhove, supra.* Mr. Justice Frankfurter wrote for the Court:

> "It should be noted that this is a case in which the defendants are members of a legislature. Legislative privilege in such a case deserves greater respect than where an official acting on behalf of the legislature is sued or the legislature seeks the affirmative aid of the courts to assert a privilege. In *Kilbourn* v. *Thompson, supra,* this Court allowed a judgment against the Sergeant-at-Arms, but found that one could not be entered against the defendant members of the House."
>
> 341 US at 378.

And only last Term the Court once again reaffirmed the strength of the *Kilbourn* holding that the sweep of the Speech or Debate Clause does not extend to an employee

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[72] The plaintiff later recovered a money judgment for $20,000 against Thompson, the Sergeant-at-Arms. See Goldfarb, *The Contempt Power* (Col. Univ. Press 1963), p. 34.

of the Legislature.[78] Mr. Justice Fortas restated the rule of *Kilbourn* in this way:

> "The leading case on the requirement of legislative purpose is *Kilbourn* v. *Thompson*, 103 US 168, 26 L. Ed. 377. *Kilbourn* did not arise under § 192,

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[78] The English history of the privilege indicates striking reasons why the legislative immunities are available only to members of the legislature. One of the most serious abuses of the privilege which developed was its extension to the servants of members. See Taswell-Longmead, Eng. Const. Hist. (11 ed. Pluckett, 1960) at 580.

> "In the 18th century . . . the extension of the privilege of peers and members from arrest, so as to protect not only their own persons, but their property, their servants and their servants' property, and even to protect their game from poaching . . . gave rise to very grave abuses, and the commons even took up the position that they and their servants were immune from civil proceedings of every kind . . ."

As Professor Wittke has described the situation:

> "By the extension of privilege to members' servants, and by granting protections to men who had no connection with either house of Parliament, scores of British subjects were freed from all amenability to the common law courts and privilege became a menace to individual liberty." Wittke, *Parliamentary Privilege in the Empire* in Essays in Honor of Charles Howard McIlwain 321 (1965).

The extension of the legislative immunities to Members' servants became so abusive that Parliament enacted a series of statutes curbing these excesses. See for example:

> 9. Act for preventing any inconveniences that may happen by Privilege of Parliament, 1700, 12 WM 3, C. 3, 1703, 2 & 3 Anne C. 18, Act to amend act passed in 12-13 years of William III, 1738, 11 Geo 2, C. 24, Act for further preventing Delays of Justice by reason of Privilege of Parliament 1770, 10 Geo 3, C. 50.

And as Professor Wittke states:

> "At present, the application of privilege has been greatly limited. Members' servants have long been denied the protection of Parliament" *Wittke, supra* at 205.

> but was a damage suit arising out of a direct exercise by the House of Representatives of a claimed power to punish for contempt. The Court held that since the subject matter of the investigation had not been legislative in character, the order of contempt of the House, directing its Sergeant-at-Arms to imprison the contumacious witness, afforded the Sergeant no protection from liability." *Gojack* v. *United States*, 384 US at 705 fn. 3.

The opinion of the lower court extending the legislative immunity to Respondent Sourwine, not a member of either House, was in direct conflict with the conclusions of this Court in *Kilbourn*, only recently reaffirmed in *Tenney* and *Gojack*, and ought to be reversed.[74]

2. No Immunity Attaches to the Actions of Respondent Sourwine Under the Doctrine of *Barr* v. *Matteo*.

(a) The lower court appears to concede that under *Kilbourn*, no immunity would extend to respondent Sourwine but suggests that *Barr* v. *Matteo*, 360 U.S. 564, in some way may have modified this Court's holding in *Kilbourn*. See footnote 11, Court of Appeals *per curiam* opinion (R. 109). However, the Court's recent discussion of *Kilbourn* in *Gojack* v. *United States*, 384 U.S. 702, would

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[74] It is of course clear that even if the Speech or Debate Clause were to be extended to employees of the legislature the immunity does not cover respondent Sourwine for the reasons discussed in full in Point One, *supra*. Legislative immunity, as we have seen, does not extend to participation in wrongful or illegal acts which are not within the sphere of legitimate legislative activity such as participation in a conspiracy with State officials to contrive false arrests and illegal searches and seizures in violation of the Fourth Amendment. Legislative privilege may not immunize respondent Sourwine from liability for participating in the illegal conspiracy any more than it immunized Sergeant-at-Arms Thompson for his participation in the illegal arrest in *Kilbourn*. And unlike Thompson, Sourwine cannot even plead, even unsuccessfully, the justification of an authorizing legislative resolution for his wrongful actions.

seem to dispel any question whatsoever concerning the continued vitality of that decision in respect to the unavailability of the legislative privilege to the Sergeant-at-Arms of the House in that case, or to the counsel to the Senate Subcommittee, equally a legislative employee, in this case.[75]

It would seem quite clear that the considerations which led the Court in *Barr* v. *Matteo* to extend the executive privilege to the Acting Director of the Office of Rent Stabilization are not applicable in the area of legislative activity. The policy considerations underlying the decision to further extend the executive immunity reflected a concern with "the effective functioning of government" in a period of "complexities and magnitude of governmental activities." 360 U.S. at 564. The policy considerations underlying the constitutional immunity embedded in the Speech or Debate Clause are quite different. Cf. *United States* v. *Johnson, supra.* They reflect primarily, as Mr. Justice Harlan discusses in his opinion for the Court, the necessity for preserving the freedom of speech and debate of the elected representatives of the people against intimidation by a hostile executive or judiciary. 383 U.S. at 182. These principles are not served by extending immunity to employees of the legislature, such as the Sergeant-at-Arms of the House, as in *Kilbourn,* or to an employee of a Senate Committee, as here. As we have seen in our main discussion on the scope of the Speech or Debate Clause, the reasons for limiting immunity to legitimate legislative activity of members of the legislature are manifold. See *Point One, supra.* General extension of the executive privilege to employees of the legislature would undermine the proper limitations upon legislative immunity which the Clause itself invokes. *Kilbourn* v. *Thompson; United*

[75] It is of some interest in connection with the suggestion that *Barr* v. *Matteo* may have weakened the holding in *Kilbourn* (R. 109), that the opinion of Mr. Justice Harlan, announcing the judgment of the Court in *Barr,* affirmatively relied upon the decision in *Kilbourn* to describe the scope of the legislative privilege. 360 U.S. at 569, fn. 6.

States v. *Johnson*, both *supra*.[76] And in the circumstances of this case, extension of a doctrine of immunity to employees of congressional committees investigating political opinions and associations of citizens would serve to encourage lawless and arbitrary action in a field in which the Court has expressed considerable concern as to the impact of legislative investigatory activity upon the sensitive area of First Amendment liberties. *Gojack* v. *United States*, *supra*; *De Gregory* v. *New Hampshire*, *supra*; *Watkins* v. *United States*, *supra*.

(b) However, even if the official immunity doctrine of *Barr* v. *Matteo* were to be extended to apply to employees of the legislature, as in *Wheeldin* v. *Wheeler*, *supra*, the doctrine has no applicability here. As we have discussed previously, see *Point One*, *supra*, the concession of the Solicitor-General in *Wheeldin* approvingly adopted by the Court that the respondent there "was not acting sufficiently within the scope of his authority to bring the doctrine into play", 373 U.S. at 647, is fully determinative here. Respondent Sourwine is charged with participation in a conspiracy under color of Louisiana laws to contrive false arrests and carry through illegal raids and seizures for the purpose of interfering with protected rights of citizens. This is an issue the lower court has concluded

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[76] The only time the Court has had before it the question of whether the doctrine of *Barr* v. *Matteo* applies at all to employees of the legislature was in *Wheeldin* v. *Wheeler*, *supra*. There the Court did not reach the question since it was conceded by the Solicitor General, and agreed to by the Court, that under the allegations of the complaint the respondent "was not acting sufficiently within the scope of his authority to bring the [immunity] doctrine into play" 373 U.S. at 647. Mr. Justice Douglas appears, however, in the opinion for the Court, to raise a question as to whether the *Barr* doctrine applies at all to legislative employees. The Justice comments "there is much discussion in the briefs of *Barr* v. *Matteo*, 360 U.S. 564" and then points out "but that was a libel action brought against a federal official in the District of Columbia" 373 U.S. at 650.

requires exploration and resolution by means of a trial (R. 105). The use of unauthorized subpoenas signed in blank by the respondent Eastland in the course of the charged conspiracy is no more "within the scope of his authority" than was the use of unauthorized subpoenas by the respondent in *Wheeldin*.

(c) Respondent Sourwine's actions are in any event, in no way protected by the doctrine of *Barr* v. *Matteo*. Mr. Justice Harlan's opinion makes it very clear that it "is not the title of his office" which "must provide the guide in delineating the scope of the rule" but rather "the relation of the act complained of to 'matters committed by law to his control or supervision', *Spalding* v. *Vilas, supra*, at 498", 360 U.S. at 573, 574. Nothing could be clearer than that the "act complained of", participation in an illegal conspiracy under color of state laws to violate the Fourth Amendment, is not protected in any way by the immunity doctrine, as defined in Mr. Justice Harlan's opinion in *Barr* v. *Matteo*. These charged acts, illegal under federal civil and criminal law, Title 42 U.S.C. 1983 and 1985, and Title 18 U.S.C. 241, 242, no more relate to matters "committed by law" to his "control or supervisions" than participation in the illegal conspiracy to defraud the United States constituted action within the sphere of the "legitimate legislative activity" of Congressman Johnson, *United States* v. *Johnson, supra*. Under the doctrine of *Barr* v. *Matteo*, respondent Sourwine's activity receives no absolute immunity. [77]

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[77] The concurring opinion of Mr. Justice Black in *Barr* v. *Matteo*, without which there would not have been a Court, is most instructive in this respect. Mr. Justice Black joined the Court on the assumption that the activity of the government official complained of was "neither unauthorized nor plainly beyond the scope of Mr. Barr's official business but instead related more or less to general matters committed by law to his control and supervision." 360 U.S. at pp. 577 and 578.

(d) Several recent Court of Appeals decisions have emphasized that charges of participation in illegal searches and seizures remove the federal officers involved from the protection of the immunity doctrine announced in *Barr* v. *Matteo*. In *Hughes* v. *Johnson*, 305 2d 67 (C.A. 9, 1962, opinion by Circuit Judge Merrill), the Court of Appeals for the Ninth Circuit rejected a claim for immunity under *Barr* v. *Matteo* on the part of federal game wardens acting under the Migratory Bird Act charged with participation in illegal searches and seizures. The Court pointed out that such conduct, in violation of the Fourth Amendment, does not "fall within the scope of the official duties of these appellees. In our view, it cannot, and accordingly, immunity does not extend to such conduct" 305 F. 2d at 70. In *Kelley* v. *Dunne*, 344 F. 2d 129 (C.A. 1, 1965, opinion by Chief Judge Aldrich), the First Circuit refused to extend the immunity doctrine of *Barr* v. *Matteo* to cover postal inspectors charged with engaging in unlawful searches and seizures, pointing out that "the public need to protect such conduct, or conduct difficult to separate therefrom, is minimal" 344 F. 2d at 133. As the First Circuit pointed out "there would be no serious hamstringing of the activities of postal inspectors if in the absence of a warrant, they were obligated, to some extent to defend their actions." 344 F. 2d at 133.[78]

The activity of respondent Sourwine was wholly "unauthorized" by the Committee. See Point One, *supra*. And it is certainly clear that participating in the planning of illegal arrests, raids, and seizures in violation of the Constitution was "plainly beyond the scope" of Mr. Sourwine's "official business." *Howard* v. *Lyons*, 360 U. S. 593, the companion case to *Barr*, leads to the same conclusions. In the words of the *Howard* opinion, respondent Sourwine's actions were hardly "in discharge of" his "official duties." 360 U.S. at 598.

[78] See Note, 44 Texas Law Review, 570 (1966). The note points out that "conducting an unlawful search is not only uncustomary but is clearly beyond the scope of an official's authority." at p. 573.

In *Fowler* v. *Southern Bell Telephone and Telegraph Co.*, 343 F. 2d 150 (C.A. 4, 1965, opinion by Circuit Judge Bell) the Fourth Circuit recently faced an analogous problem to the illegal searches and seizures in *Hughes* v. *Johnson* and *Kelley* v. *Dunne*. Special investigators for the Alcohol and Tobacco Tax Division of the Department of Internal Revenue were charged with wiretapping. The Court of Appeals rejected any claim of immunity under *Barr* v. *Matteo* for the alleged acts of wiretapping, in an opinion which raises considerations relevant here. The Court pointed out:

> "Defense of sovereign privilege imposes a drastic impingement on personal liberty, and is recognized only because this impingement is considered justified in order to encourage public officials to fearlessly discharge the duties of their office. . . . The defense should not be sustained on the basis of technical procedural defaults of the opposing party or in the absence of a clear and specific factual demonstration that the actions of the officers were indeed taken in pursuit of their official duties. This standard has not yet been met in connection with the alleged wiretapping here." 343 F. 2d at 155.

These recent Court of Appeals decisions emphasize that the policy considerations which impelled the Court to extend the official immunity doctrine in *Barr* v. *Matteo*—a determination that federal officials should not be deterred in their freedom to develop executive policy by the fear of "civil defamation suits", 360 U.S. at 574—do not govern situations in which federal officials are charged with illegal invasions of citizens' constitutionally protected rights to privacy and security of person. Here damage suits which "might appreciably inhibit" the unlawful violation of the liberties of the First and Fourth Amendments serve the highest public purpose. The "fearless, vigorous and effective administration of policies of government", *Barr* v. *Matteo*, 360 U.S. at 571, is not inhibited by a requirement that Government officials hew at a minimum to the com-

mands of the Constitution. *Olmstead* v. *United States*, 277 U.S. 438, 485.[79]

(e) Finally, even if the doctrine of official immunity elaborated in *Barr* v. *Matteo* could possibly be stretched to apply to the facts of this case there is very serious question as to whether the judicially constructed doctrine is applicable at all to actions brought under the Civil Rights Acts, Title 42 U.S.C. 1983 and 1985. Cf. *Monroe* v. *Pape*, 365 U.S. 167; *Chafin* v. *Pratt*, 358 F.2d 349 (C.A. 5, 1965), *Birnbaum* v. *Trussell*, 347 F.2d 86 (C.A. 2, 1965); *Pierson* v. *Ray*, 332 F.2d 213 (C.A. 5, 1965) cert. granted— U.S. —, #79 and 94, October Term, 1966.[80]

In *Birnbaum* v. *Trussell, supra*, the Second Circuit, in an opinion by Circuit Judge Hays, suggests that the doctrine of official immunity has no relevance to actions brought under the Civil Rights Acts.[81] The Court of Appeals points out that "a showing that defendants acted 'within the scope of their employment and authority' is not sufficient to defeat the district court's jurisdiction.

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[79] *Barr* v. *Matteo* does not, we suggest, within its own definitions immunize the charged illegal acts of participation in the October 4 raids. If the doctrine could be stretched to such a point the recent comment of Circuit Judge Brown in *Chafin* v. *Pratt*, 358 F.2d 349 (C.A. 5, 1966) would require consideration: "[I]t may well be that the immunity doctrine has now been extended too far, that the policy of the doctrine as analyzed by Judge Learned Hand in *Gregoire* v. *Biddle*, 2 Cir. 1949, 2 Cir. 1949, 177 F.2d 579, cert. denied, 1950, 339 U.S. 949 merits reexamination, especially in light of the trend towards contracting other kinds of tort-liability immunity." 358 F. 2d at 353, fn. 9. *Cf.* the dissenting opinions of the Chief Justice and Mr: Justice Douglas in *Barr* v. *Matteo*, 360 U.S. at 578, the dissenting opinion of Mr. Justice Brennan, 360 U.S. at 586, and the dissenting opinion of Mr. Justice Stewart, 360 U.S. at 592.

[80] See, also, generally, *The Doctrine of Official Immunity Under the Civil Rights Act*, 68 Harv. L. Rev. 1229 (1955).

[81] See also the recent decision in *Fleming* v. *Adams*, 253 F. Supp. 542 (D.C. Col. 1966) citing *Birnbaum* approvingly.

It would nullify the whole purpose of the Civil Rights statutes to permit all governmental officers to resort to the doctrine of official immunity." The Court of Appeals went on to point out that "to the extent that defendants acting 'under color' of state law 'violate or conspire to violate constitutional and federal rights the Civil Rights Laws, 42 U.S.C. 1983 and 1985 abrogate the doctrine of official immunity.' " 347 F.2d at 89.[82]

As we have pointed out, the doctrine of official immunity has no applicability whatsoever to the facts of this record. But if it could be enlarged in such a way so as to immunize the acts of respondent Sourwine we would suggest that such a result would undermine the Congressional purpose underlying the Civil Rights Acts. This Court has held that "Congress, in enacting § 1979, meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe* v. *Pape,* 365 U.S. 167, 172. A grant of immunity to this respondent who, acting under color of state laws, is charged with conspiring, together with state officials, to violate the Fourth and Fourteenth Amendment rights of the petitioners and other citizens through participation in the plan to contrive the October 4 raids would, in the words of the Second Circuit, "nullify the whole purpose of the Civil Rights Statute." *Birnbaum* v. *Trussell,* 347 F.2d at 89.

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[82] The Fifth Circuit has expressly left open the question as to whether the immunity doctrine applies to suits brought under the Civil Rights Act. In *Chafin* v. *Pratt,* 358 F. 2d 349 (C.A. 5, 1966), the Court of Appeals expressly "refrained from deciding" this question, 358 F.2d at 354. The Court in its opinion by Circuit Judge Brown, pointed out that the Circuit had also expressly refrained from deciding this question in both *Norton* v. *McShane,* 332 F.2d 855, cert. den. 1965, 380 U.S. 981 and in *Pierson* v. *Ray,* 352 F.2d 213, cert. granted — U.S. — , Nos. 79 and 94, October Term, 1966. Accordingly, this question is presently before the Court in *Pierson* v. *Ray,* Nos. 79 and 94, October Term, 1966. As the Court of Appeals said in *Chafin,* "In *Pierson* v. *Ray, supra,* we noted that it is still uncertain whether immunity applies to suits under the Civil Rights Act and again refrained from deciding the question. 352 F.2d at 218". 358 F.2d at 354, fn. 16.

POINT THREE

The lower court was fully justified in concluding that there are in this record disputed issues of fact as to whether respondents were parties to a knowing concert of action with the state officials which would require exploration and resolution by way of a trial.

We have already pointed out that in this Court the respondents have not chosen to argue that the mantle of legislative immunity may properly be placed over the charge that they participated in a conspiracy with the state officials under color of state law, to contrive the illegal October 4 raids, arrests, searches and seizures. They would seem to agree that such conduct is totally beyond the scope of "legitimate legislative activity." See *Point One, supra,* at p. 64; Brief for Respondents in Opposition, pp. 10, 11. Instead they chose to rest their defense to this claim solely upon the argument that summary judgment was properly entered by the District Court on the cause of action for money damages because the petitioners failed to put forward a serious claim that the respondents were parties to the conspiracy. Brief for Respondents in Opposition, pp. 9, 10. See *Point One, supra,* at p. 65.

The difficulty with this position is, of course, that the Court of Appeals has already found against the respondents on this question. In the lower court respondents argued alternatively (1) that the petitioners "failed to put forward a serious claim that appellees [respondents] were parties to a knowing concert of action with the state officials" (R. 105), see Brief for Appellees, pp. 13, 30, and (2) that "in any event, the doctrine of legislative immunity insulates appellees from suit" (R. 105), Brief for Appellees, pp. 30-37. The Court of Appeals rejected the first position pointing out that "were only the former involved, we might have considerable difficulty in concluding that there were no dis-

puted issues of fact requiring exploration and resolution by means of a trial" (R. 105). The heart of the matter is that the respondents are now asking this Court to overturn the conclusion of the court below that on the record there are disputed issues as to the respondents' participation in a knowing concert of action with the state officials which can only be resolved by means of a trial. Placing to one side any question as to the propriety of such a request from the point of view of judicial administration, the conclusion of the lower court that the issue as to whether respondents were parties to the charged conspiracy requires "exploration and resolution by means of a trial" is fully supported by the record.

Respondents' position very simply is that their naked denials of the participation in the conspiracy together with the denials of their charged co-conspirators are sufficient to grant summary judgment on the conspiracy charge. See Brief for Respondents in Opposition, pp. 9, 10.[83] This argument totally disregards the entire record. The total record, complaint, affidavits and depositions contain evidence of respondents' participation in the "knowing concert of action with the State officials" (R. 105), more than sufficient to compel the conclusion of the Court of Appeals that this was a "disputed issue of fact requiring exploration and resolution by means of a trial" (R. 105).

The "concert of action" is set forth in the complaint. The complaint charges that the respondents, Eastland and Sourwine, participated in a plan and conspiracy together

[83] The Solicitor-General's position is that respondents Eastland and Sourwine have sworn "that they had played no part in the October 4 searches . . . that their actions in subpoening the seized materials had not been part of any understanding or conspiracy with the Louisiana officials responsible for the searches" and that they "had no prior knowledge of the Louisiana legislative committee's decision to proceed by search and arrest warrants." Brief for Respondents in Opposition, pp. 9, 10.

with certain Louisiana State officials, to utilize certain state statutes as the device to contrive and instigate raids, arrests, searches and seizures, in violation of the Fourth Amendment, to seize, among other things, the files and membership lists of SCEF for the purpose of harassing, intimidating and deterring the petitioners and other citizens from exercising federal rights under the First Amendment in their efforts to implement the promise of racial equality guaranteed by the Fourteenth Amendment (R. 2-12).

The following essential facts emerge from the complaint, affidavits and depositions from which respondents' participation in this plan or conspiracy may be inferred sufficient to require resolution by trial. See *Poller* v. *Columbia Broadcasting System*, 368 U. S. 464; *Sartor* v. *Arkansas Natural Gas Corp.*, 321 U. S. 620; *United States* v. *Continental Oil Co.*, 377 U. S. 161. See also *Blumenthal* v. *United States*, 332 U. S. 539; *Pereira* v. *United States*, 347 U. S. 1; *Glasser* v. *United States*, 315 U. S. 60; *American Tobacco Co.* v. *United States*, 328 U. S. 781.[84]

1. Respondent Sourwine had several private discussions during the summer and early fall of 1963 just prior to the October raids with Jack N. Rogers, the counsel to the Joint Legislative Committee on Un-American Activities of the Louisiana legislature. These discussions were about the records and files of SCEF (R. 40, 41). The first discussion took place about July 17, when Rogers told Sourwine that the Louisiana Committee was contemplating obtaining the records (R. 40).

2. Sometime prior to September 20, it was concluded that the method of seizure of the SCEF records ought to be through using the criminal provisions of the Louisiana anti-subversive laws to obtain arrest and search

[84] All of these facts come from respondents' own proof in the form of affidavits submitted, from the Sourwine deposition or from decisions of the Louisiana courts and the federal courts.

warrants, rather than proceeding as had been first discussed by direct subpoena by the Legislative Committee (R. 71).[85]

Respondents' own affidavits place this decision to use the device of raids and arrests sometime prior to September 20, when the plan was proposed to the Louisiana police by Rogers (R. 71). Rogers himself says in his affidavit that he advised the Joint Committee that the SCEF operations were in violation of the Louisiana criminal laws and that sometime prior to September 20 the Joint Committee directed him to take the matter up with the Louisiana Police (R. 71).

3. Actually, an affidavit of the Staff Director of the Joint Committee filed in the Louisiana branch of the litigation reveals that the plan to utilize police procedures to carry out the raids and seizures originated as early as August 27. The Alexander affidavit, Appendix F to this Brief, reveals that the plan to seize the SCEF records, designated as "Operation Tip-Top" was discussed at an August 27 meeting of the Joint Committee at which time Alexander was told to contact officials of the New Orleans Police Department and enlist their assistance. See minutes of August 27 meeting, affixed as an exhibit to the Alexander affidavit, Appendix F to this Brief.

4. Rogers' own affidavit then reveals that considerably after the 27th of August, around "the middle of September", he made a telephone call to Sourwine and discussed the SCEF records with him again and asked him if he, Sourwine, and another Subcommittee employee could come down to Louisiana when the records were obtained and help "evaluate" the material (R. 71). Sourwine's own affidavit confirms the discussion (R. 40). Sourwine then discussed the content of this talk with Senator Eastland (R. 40). These discussions

[85] It is a fair inference that the participants in this plan were aware of the decisions of this Court such as *Louisiana* v. *NAACP*, *supra*; *cf.*, also, *NAACP* v. *Alabama* and *Gibson* v. *Florida*, both *supra*, holding that the enforced production of membership lists of civil rights organizations in the southern states violated the First Amendment guarantee of freedom of association.

took place after the August 27 discussion of the plan described in the Alexander affidavit to use raids and arrests to seize the SCEF records, and just at the time, by Rogers' own admissions, that he was preparing to put the plan into operation (R. 71).

5. Sometime shortly after the middle of September, Rogers put the plan into operation. On or about September 20, he met with the State Superintendent of Police and requested that he have the State Police obtain search warrants for the SCEF offices and petitioner Dombrowski's home (R. 72). Rogers' affidavit states that he offered to assist the police and his offer was accepted. On October 2, Rogers and a policeman swore to applications for search warrants and arrest warrants under the Louisiana "anti-subversive" statutes and they were issued (R. 72).

6. On October 4, the raids, arrests and seizures of the SCEF records and properties, which were the object of the plan, took place. The circumstances of the arrests and raids are detailed in this Court's opinion in *Dombrowski* v. *Pfister*, 380 U.S. 479, 480, fn. 4. Rogers and police officers broke into the office of SCEF and seized the entire contents of the office including the records, and membership lists which had been the subject of the August and September discussions (R. 4, 5, 21, 22). These raids, the arrest warrants, and the search warrants were all, at later stages, in the state court litigation, declared to be illegal. The arrest warrants were held to have been issued without reasonable cause and the petitioner summarily discharged (R. 19, 20). The search warrants and the seizures of the SCEF records and property of the petitioners were held to be in violation of the Fourth and Fourteenth Amendments, under this Court's decision in *Mapp* v. *Ohio* (see Appendix B).

7. Although none of this was known to petitioners or to the public at the time, the records and files of SCEF were swiftly transferred from the control of the police over to the control of the Louisiana Committee and the respondents Eastland and Sourwine. This was accomplished through a complicated maneuver. At the time of the seizure of the records by the police on the afternoon of October 4, Rogers served upon the police officer

in charge a Louisiana Joint Committee subpoena requiring "forthwith production of everything seized by the police" (R. 72). The seized materials, however, remained in the physical possession of the police, who took them that evening to Baton Rouge (R. 72). At 10:30 p.m. that evening, Rogers telephoned Sourwine in Washington and told him about the seizures of the SCEF records. Rogers told him that the Louisiana Committee had obtained all the files and records of SCEF and urged him to come down to Louisiana "as soon as possible" (R. 40, 73).

8. The next stage in the secret transfer of the seized records took place the following morning. Sourwine left Washington at 8:20 and arrived in Baton Rouge at 11:00 (R. 41). According to his own deposition testimony he came prepared with blank subpoenas signed by Eastland (R. 32). After discussing the situation with Rogers he then had a telephone conversation with Eastland (R. 41). Sourwine then had the blank subpoenas filled out in Baton Rouge by Rogers' secretary and served them on Rogers that morning (R. 32). There is some evidence, the date on the face of the subpoenas, that they were actually made out on the 4th, the day of the raids (R. 32, 33), but the respondents say this was a "stenographic error" (R. 33, 41). In any event the final step in the complicated transaction was to "appoint" the Superintendent of the Louisiana police the "custodian" of the seized records on behalf of Sourwine (R. 37). However, the location of the records remained in Baton Rouge under the physical control of the state officials (R. 37). The issuance of these subpoenas was never authorized by the Internal Security Subcommittee or by the full Committee (R. 33, 34). Within twenty-four hours the planned operation had taken place, from seizure by the police under color of the illegal search and arrest warrants, to the instantaneous transfer to the Louisiana Committee, to the transfer the next morning to respondents Sourwine and Eastland.

9. None of the details of the secret plan were known to petitioners, or for that matter to the public, until October 25, the day of the preliminary hearing on the arrest warrants in the state court. After the state court

vacated the warrants and discharged petitioners, the Louisiana officials informed the Court that they could not comply with any order to return the records and membership lists since they were technically in the custody of Sourwine and Eastland (R. 28). Until that moment petitioner had known nothing about respondents' role in the raids and the seizures.

10. The petitioners then filed their first federal complaint. See Statement of Facts, p. 11, *supra*. A motion for a temporary restraining order was presented to District Judge Ainsworth on Sunday morning, October 27. The Judge was assured by representatives of the State that the seized records were still in Baton Rouge (R. 29). Accordingly, he directed that the motion be returnable before him Monday morning, the 28th. He also directed that petitioners notify respondent Eastland that the motion would be heard in District Court the next morning (R. 29). A telegram was sent to Eastland informing him that an injunction enjoining the turning of the SCEF records over to him was to be discussed at 9:30 a.m., Monday morning, in Judge Ainsworth's office (R. 54).

11. On Sunday evening, as soon as he received this telegram, Eastland arranged to have the seized records immediately moved out of the jurisdiction of the Louisiana federal court, over the state border to Woodville, Mississippi. He then directed Sourwine to telephone Baton Rouge at once and arrange to have all the seized records, membership lists and other SCEF property transferred that night out of the State of Louisiana (R. 55). When it appeared that hiring a truck would be difficult at that time of night, Eastland told Sourwine to "get them started" and "get them out to Woodville and if necessary you can leave them with the Chancery Clerk there" (R. 55).

12. At about 10:00 p.m. Sourwine telephoned Rogers and asked him to give the police Eastland's instructions to get the SCEF records out of Louisiana that night and over to Woodville, Mississippi (R. 73-74). At 11:43 p.m. Sourwine confirmed these instructions to move the SCEF material immediately out of the state, in a telegram he sent to the Superintendent of Police

(R. 56). As a result of these Sunday night moves, at about midnight a vanload of material containing the seized SCEF records and lists was moved over the Louisiana state border to Woodville, Mississippi, and left under the protection of the Mississippi Clerk of the Chancery Court at Woodville (R. 29, 58).

13. This midnight transfer of the seized SCEF records out of the State of Louisiana into Mississippi was neither authorized by or known to other members of the Senate Subcommittee (R. 57).

14. On Monday morning, October 28, after postponing their 9:30 appearance until 12:00 noon, the attorneys for the state officials appeared before Federal Judge Ainsworth and informed him and the petitioners that the seized SCEF records were no longer in the jurisdiction of the Federal District Court since all the records and materials seized in the illegal raids of October 4 had been removed the night before from the State of Louisiana and were now in the State of Mississippi, across the state line (R. 29).

Upon this record, built primarily out of statements and admissions made by the respondents themselves, it is more than understandable that the lower court would have had "considerable difficulty in concluding that there were no disputed issues of fact requiring resolution by means of a trial" (R. 105). Summary judgment for the respondents on the issue of their participation in the "knowing concert of action with the state officials" (R. 105) would be unthinkable on such a record. *Poller* v. *Columbia B oadcasting System*, 368 U.S. 464, is dispositive here.[86] As Mr. Justice

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[86] In *Poller* v. *Columbia Broadcasting System*, Mr. Justice Clark defined the principles controlling summary judgment in a manner instructive here:

"Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c), Fed.

Clark pointed out in *Poller*, summary procedures should be used "sparingly in . . . complex litigation where motive and intent play leading roles, [and] the proof is largely in the hands of the alleged conspirators and hostile witnesses thicken the plot." In these cases "trial by affidavit is a substitute for trial by jury which so long has been the hallmark of even-handed justice," 368 at 491. Here, on this record, the evidence shows an overwhelmingly strong case, requiring trial by jury. Participation in a conspiracy need not be proven by direct evidence, but a common purpose and plan may be inferred from a development of circumstances. *Glasser* v. *United States*, 315 U.S. 60. As this Court pointed out in *Blumenthal* v. *United States*, 332 U.S. 539, "Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others. Otherwise . . . conspirators would go free by their very ingenuity." 332 U.S. at 556, 557. And in *American Tobacco Co.* v. *United States*, 328 U.S. 781, the Court wrote, in words directly applicable here, "where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified," 378 U.S. at 810. And only last

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Rules Civ. Proc., 28 U.S.C.A. This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' *Sartor* v. *Arkansas Natural Gas Corporation*, 321 U.S. 620, 627, 64 S. Ct. 724, 728, 88 L. Ed. 967 (1944)." 368 U.S. 464 at 467.

term, the Court in discussing the requirement of showing of conspiracy in a Sherman Act case said, in instructive terms here, "Explicit agreement is not a necessary part of a [Sherman Act] conspiracy—certainly not where, as here, joint and collaborative action was pervasive in the initiation, execution and fulfillment of the plan." *United States* v. *General Motors Corp.*, 86 S. Ct. 1371 (opinion by Mr. Justice Fortas). See also *United States* v. *Parke Davis Co.*, 362 U. S. 29; *United States* v. *Bausch & Lomb*, 321 U.S. 707.

The record here fully shows a "joint and collaborative action [which] was pervasive in the initiation, execution and fulfillment of the plan" 86 S. Ct. at 1329. Based upon facts appearing solely in their own affidavits and their own deposition testimony, it is almost unbelievable that having jointly discussed the SCEF records at the very time when the plan to instigate the illegal raids was germinating, that these respondents did not know of, or share in, the planning. As the Court has recently pointed out, "joint and collaborative action," such as the record shows here, amply grounds a conspiracy finding. *United States* v. *General Motors, supra.*

The respondents say in this Court that they "had no prior knowledge of the Louisiana Legislative Committee's decision to proceed by way of search and arrest warrants," Brief for Respondents in Opposition, p. 10. This would seem to be an incredible assertion in the face of respondents' own evidence, to say nothing of the disclosure of the August 27 meeting, but at a minimum it is surely impossible to say that "it is quite clear what the truth is [and] no genuine issue remains for trial" *Poller* v. *Columbia Broadcasting System*, 368 U.S. at 467. Furthermore in the face of the story of the October 4 twenty-four hours is it possible to say that there is "no genuine issue" as to whether there was a "joint and collaborative action" in "executing and fulfilling" the objectives of the illegal seizures? *United States* v. *General Motors, supra,* and *cf. United Mine*

Workers v. *Gibbs*, 86 S. Ct. 1130. Or for that matter is it possible to say that "no genuine issue remains for trial" as to the reasons for the extraordinary events of Sunday night, October 28th? Is it "quite clear," *cf. Poller* v. *Columbia Broadcasting, supra,* that the truth may not be that respondents Eastland and Sourwine engaged in the midnight spiriting of the seized records out of the jurisdiction of the Louisiana federal court because they knew that they had been illegally and unlawfully seized in the October 4 raids?[87]

It would seem more than apparent why the lower court commented that it would "have considerable difficulty in concluding that there were no disputed issues of fact requiring resolution by means of a trial" (R. 105). The issue as to whether these respondents were "parties to a knowing concert of action with the state officials" (R. 105) to contrive the illegal raids of October 4 must be settled by a "trial by jury which so long has been the hallmark of 'even-handed justice' " *Poller* v. *Columbia Broadcasting System*, 368 U.S. at 473. This Court has no cause to disturb the conclusions of the lower court that this issue requires "exploration and resolution by means of a trial" (R. 105).

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[87] The law is filled with prejudicial inferences to be drawn from attempts to suppress or conceal or remove evidence. *Bruce Cotton* v. *United States*, 50 F. 2d 257, affd. 55 F. 2d 568 (C.A. 5); *The Sam Sloan*, 65 F. 175 (D.C. N.Y.); see *Great American Insurance Co.* v. *Horab*, 309 F. 2d 262 (C.A. 8, 1962); *cf.*: *Commonwealth* v. *Webster*, 5 Cush. (Mass.) 295; or the prejudicial inference to be drawn from attempts to prevent an investigation of a matter in controversy, *Hodges* v. *Murray*, 240 Ky. 127; *Polk* v. *Missouri-Kansas-Texas R. Co.*, 351 Mo. 865.

POINT FOUR

The equitable relief sought by petitioners was appropriate.

(a) The District Court dismissed the cause of action for equitable relief, without a hearing on the allegations, treating the action as a request for injunctive relief against a Committee of the Senate. Invoking the principle of "'separation of powers'' the District Court stated that ''this Court may not enjoin a Congressional Committee from pursuing its activities'' (R. 13), and dismissed the complaint for want of jurisdiction.

The Court of Appeals properly disregarded this contention pointing out that the complaint did not seek to enjoin the Senate Committee in any respect, but that the relief sought was directed solely against the individual respondents (R. 104).[88] As the Court of Appeals conceded, the complaint did not seek injunctive relief against the functioning of a Congressional Committee (R. 104).

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[88] That this complaint states a cause of action for equitable relief under the Civil Rights Act, *Dombrowski* v. *Pfister*, 380 U.S. at 490; *Hague* v. *CIO*, 307 U.S. 496; *Bush* v. *New Orleans Parish School Board*, 188 F. Supp. 916, aff'd 365 U.S. 569; *Jordan* v. *Hutchinson*, 323 F. 2d 597 (C.A. 4, 1963), is clear. The doctrine of separation of powers has, of course, no relevance here. The complaint charges that these respondents, together with legislative and executive officials of the state, conspired to use state law to conduct the illegal raids. The fact that they are "legislative" officers or employees has no impact upon the power of a federal court to grant equitable relief. *Jordan* v. *Hutchinson, supra. Bush* v. *New Orleans Parish School Board, supra.* In any event, it is too late to argue that the investigative powers of Congress are not subject to the controls of the Constitution and judicial review. From *Kilbourn* v. *Thompson*, 103 U.S. 168 to *Watkins* v. *United States*, 354 U.S. 178, the principle is crystal clear that the investigative functions of Congress are subject to constitutional control. The words of the Chief Justice in *Watkins* are decisive here: ". . . Clearly, an investigation is subject

The complaint charged that these individual respondents "without warrant or authority of law" pursuant to the conspiracy "secretly and surreptitiously" were in possession of certain books, records and other documents which had been seized in the illegal raids of October 4th conducted under color of laws of the State of Louisiana (Complaint, Paragraph 22, R. 7), and went on to charge that "in order to evade the jurisdiction" of the United States District Court for the Eastern District of Louisiana, the respondents transferred certain of these documents and records to the District of Columbia and that these "are presently in the possession of defendants Eastland and Sourwine in the District of Columbia". Other documents and records belonging to petitioners were "also secretly and surreptitiously transferred to a State Court House in the State of Mississippi and are presently in the possession of defendant Eastland" (Complaint, Paragraph 22, R. 7).

The complaint nowhere charged that the illegally seized records or documents were in the custody or possession of the Senate Committee. It charged solely that they were illegally and without "warrant of law" in the possession of

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to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of law making. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of these protected freedoms by law or by lawmaking." Lest there be any impression whatsoever that the investigative functions of Congress are free of judicial restraint through some magic invocation of a formula of "separation of powers" the Chief Justice went on further in *Watkins* and warned: ". . . We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly."

the individual respondents, Sourwine and Eastland, who had obtained them pursuant to a conspiracy to utilize Louisiana state laws to violate petitioners' federally protected rights.

As far as the complaint was concerned, and that was all that was properly before Judge Holtzoff on the motion to dismiss, *Clark, Attorney General* v. *Vebersee Firanz Korporation*, 332 U.S. 480, injunctive relief was sought to restrain these respondents who had participated in a conspiracy under color of state law, from using or disposing of the fruits of the illegal searches and seizures. There was no allegation whatsoever that the illegally seized material was in the possession of the Senate Committee, nor was any injunctive relief sought against the Committee. As a matter of fact, the complaint alleged that a good portion of the illegally seized material was then sitting in the private possession of respondent Eastland in a state courthouse in the State of Mississippi (R. 7).[89]

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[89] Paragraph 22 of the Complaint states:

"22. In further pursuance of this conspiracy defendants Burbank, Willie and Pfister, at the request of defendants Eastland and Sourwine, secretly and surreptitiously, without warrant or authority of law, transferred a portion of said books, records, documents and other articles belonging to the plaintiffs out of the jurisdiction of the United States District Court for the Eastern District of Louisiana. Plaintiffs had instituted in that Court a proceeding under appropriate federal statutes to obtain the return of said documents and articles, and to receive appropriate redress under the law for the illegal acts of the defendant conspirators. In order to evade the jurisdiction of that Court, the defendants caused to be transferred a portion of the said documents, records and other articles to the District of Columbia. Upon information and belief said documents, articles and records are presently in the possession of defendants Eastland and Sourwine in the District of Columbia. Other documents and records, all belonging to the plaintiffs, illegally and in violation of the Constitution of the United States seized from them, were also secretly and surreptitiously transferred to a State Court House in the State of Mississippi, and are presently in the possession of defendant Eastland."

(b) The Court of Appeals does not rest its affirmance upon the jurisdictional grounds invoked by the District Court. Instead it bases its approval of the dismissal of the equitable cause of action purely upon its conclusion that the equitable relief sought against the individual respondents would not be effective since other "members of the Subcommittee would still have unfettered use of the documents" (R. 104). This portion of the opinion of the lower court is based upon an assumption that although the complaint probably adequately states a cause of action for equitable relief against the individual respondents,[90] it should be dismissed because the relief sought, although otherwise valid, may have been frustrated by subsequent actions of the respondents in turning the seized documents over to the Senate Committee. That this assumption was wholly unwarranted is apparent in light of the record before the District Court at the time of dismissal. The fact that the seized materials, first removed at midnight on the evening before a federal court hearing out of the reach of the jurisdiction of the federal court, then deposited in the sanctuary of a Mississippi Chancery Clerk's office safe from the process of the Eastern District of Louisiana, were now allegedly in the Washington offices of the Internal Security Subcommittee of the Senate, was hardly a reason to assume that an injunction permanently restraining the individual respondents from using the fruits of the illegal raids and seizures would be "of no benefit to the plaintiffs" (R. 105).

The lower court relied upon this Court's statement in *Virginia Ry.* v. *System Federation* No. 40, 300 U.S. 515, 550 (1937) that "A court of equity may refuse to give any relief when it is apparent that that which it can give will not be

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[90] It would be difficult indeed to hold that the complaint did not state a cause of action for equitable relief against the individual respondents in view of this Court's holding in *Dombrowski* that the allegations there stated a cause of action under Title 42 U. S. C. 1983. 380 U. S. at 490.

effective or of no benefit to the plaintiff." What the lower court did not mention was that in *Virginia Ry.* this Court *upheld* the granting of equity relief pointing out that "whether the decree will prove so useless as to lead a court to refuse to give it, is a matter of judgment to be exercised with reference to the special circumstances of each case rather than to general rules which at most are but guides to the exercise of discretion" 300 U.S. at 551. It is perfectly clear that under the principles of *Virginia Ry.* this "exercise of discretion" can be engaged in only after a hearing on the facts of "the special circumstances of each case" 300 U.S. 551.[91]

Accordingly, at a minimum, petitioners were entitled to a hearing on their complaint at which time the respondents' defense of futility to the plea for equitable relief could have been tested. See *Virginia Ry.* v. *System Federation, supra.* Among the many issues petitioners were entitled to litigate would have been the highly pertinent question as to whether the individual respondents retained copies of the seized documents, particularly the membership lists illegally taken, and whether they had given these copies to other individuals throughout the country. At this moment petitioners can only speculate as to where these copies, admittedly made by respondents, are now located. This Court is well aware of the use sought to be made of membership lists of civil

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[91] Respondents rely upon the decisions of this Court in *Williams* v. *Fanning,* 332 U. S. 490, and *Blackmar* v. *Guerre,* 342 U. S. 512, to support their contention that "the injunction directed to respondents would have been ineffective". Brief for Respondents in Opposition, p. 9. Neither case is relevant here. In *Williams* v. *Fanning,* the Court granted the relief holding that where "the decree which is entered will effectively grant the relief desired by expending itself on the . . . official who is before the Court," the decree should issue. 332 U. S. at 494. See, also, *Hynes* v. *Grimes Packing Co.,* 337 U. S. 86 (1948). In *Blackmar* v. *Guerre* the relief sought was not proper since the defendant sued had no power at all to give any of the relief sought, clearly not the situation here.

rights organizations in certain areas of the southern states. See *Gibson* v. *Florida Legislative Committee; NAACP* v. *Alabama; NAACP* v. *Flowers; Louisiana* v. *NAACP*, all *supra*. Since the decision of the Court in *NAACP* v. *Alabama* it has become increasingly clear that enforced production of membership lists of civil rights organizations active in the southern states itself violates the Constitution. The complaint charges that a central purpose of the conspiracy was to utilize the Louisiana laws as a pretext for the staging of raids during which the membership lists could be seized—lists not otherwise obtainable to the Southern authorities through lawful legislative process, state or national. As this Court has pointed out, the demand for these membership lists has "a deterrent and 'chilling' effect on the free exercise of constitutionally enshrined rights of free speech, expression and association." *Gibson* v. *Florida Legislative Committee*, 372 U. S. 557. And the serious nature of the "chilling" effect caused by the knowledge that the SCEF lists of names were in the hands of respondents Eastland and Sourwine must be evaluated in light of the warning words of this Court in *Gibson*:

> "What we recently said in *NAACP* v. *Button*, *supra*, with respect to the State of Virginia is, as appears from the record, equally applicable here: 'We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community . . .' 371 U. S., at 435." [at p. 557]

To sanction the dismissal of the equity provisions of the complaint on the ground that the actions of the respondents had, in effect, frustrated any possibility of legal relief, would be to lend judicial approval to the extraordinary course of events set off by the October raids. The Louisiana state court could not order the return of the seized materials when it quashed the original arrest warrants because it was told by the state participants in the conspiracy that

the seized materials were technically not in their hands but under the control of the respondents. The Louisiana federal court to which the petitioners then turned for relief could not order the materials returned because they were spirited out of its jurisdiction by these respondents the night before the hearing on a temporary restraining order, into the sanctuary of a Mississippi Chancery Clerk's office, safely across the Louisiana border. And when federal process finally caught up with the respondents in the District of Columbia in the form of this action, petitioners were faced with the final frustration of any legal recourse—the conclusion of the lower court that petitioners were too late since respondents had safely deposited the illegally obtained material in hands supposedly beyond the reach of the law.[92]

The peremptory dismissal of the equitable cause of action legitimates a course of conduct designed to frustrate any effort to invoke the processes of law, state and federal to protect these petitioners from the harmful effect of raids and seizures both Louisiana courts and this Court have condemned as unlawful.[93]

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[92] The entire story of this unsuccessful legal pursuit of the illegally seized materials is set forth in the Statement of Facts and Point Three, *supra*.

[93] It also frustrates the mandate and decree of this Court. In *Dombrowski*, the Court ordered the District Court to frame a decree providing for the immediate return of all papers and documents seized. The reinstatement of the equitable cause of action in this case would permit the enforcement of the decree of this Court in respect to these individual respondents since, by their own admissions, copies of all seized materials were made.

Conclusion

This case has brought to the Court a series of questions which in a certain sense touch the fundamentals of a free society. Ultimately they raise the issue of whether in a government of ordered liberty it can be said that any man, by virtue of his power, his status or his high authority, is wholly above the law.

In this case a United States Senator and his assistant stand before the Court charged with participating together with officials of a state in a conspiracy to utilize laws of that state to procure the false arrest of citizens, to contrive illegal raids upon their homes and offices, and searches and seizures of their records and property in open violation of the Fourth Amendment. The conspiracy they stand charged with being parties to had as its purpose the intimidation and deterring of citizens from exercising fundamental rights of speech, press and association in their efforts to implement the constitutional promise of racial equality and justice. The laws of the United States provide remedies against such conduct. The Civil Rights Acts were designed for this very purpose. This Court must now decide whether the remedies the law provides are to be denied these petitioners because the respondents are men whose status places them beyond the reach of law. The Speech or Debate Clause with its roots deep in the history of the strivings of a people for liberty, requires no such result.

This case calls for the response this Court has always given when rank and status have been asserted as a shield to protect the powerful from processes of law invoked to protect the liberties of a citizen. In the first days of the Republic this Court said, in *Marbury* v. *Madison*, that "the Government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws

furnish no remedy for the violation of a vested legal right". In reversing the judgments below, and in requiring these respondents to stand trial on the charges here made, this Court would be reaffirming these words.

The judgments below should be reversed.

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APPENDIX A

Constitutional and Statutory Provisions Relied On

ARTICLE I, SECTION 6

The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TITLE 42 USC 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

TITLE 42 USC 1985, SECTION 3

If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein

do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

APPENDIX

CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

SECTION B

No. 183 459

Vic. R.S. 14:360

STATE OF LOUISIANA

against

JAMES A. DOMBROWSKI

JUDGMENT

On January 29, 1964 the Orleans Parish Grand Jury found a True Bill against the defendant, charging said defendant with violating Revised Statute 14:360. On March 5, 1964 the defendant, through his counsel of record, filed a Motion for Prayer for Oyer and a Motion to Suppress the evidence. Hearing was had on the Motion to Suppress on March 23, 1964 and at the conclusion of the presentation of evidence and brief argument by both the State and the Defense, the matter was continued as an open matter for purposes of filing briefs. Briefs were received by the Court from both the State and Defense at which time the matter was taken under advisement. At the same time, the time of the presentation of the briefs, counsel for defendant filed a Plea of Res Judicata and, accordingly this, too, was taken under advisement. On May 28, 1964 the State, through the Assistant District

Attorney, filed its Answer to the Plea of Res Judicata and other memoranda in support of their positions. The matter was then set for further argument on June 9, 1964.

As to the Plea of Res Judicata counsel for defense cites to the Court that this Matter Case No. 181 975 of Section E of the Criminal District Court for the Parish of Orleans involving the same defendant, and the same Search Warrants here involved, found that the State witnesses "obviously have not justified the arrest . . ." and ". . . since there has not been a prima facie case made against these three defendants and, therefore discharges them without date." (Transcript of the record.)

Counsel for defendant points out that since they found the [sic] Arrest Warrants of the defendant was found to be illegal then, necessarily, the Search Warrants, issued concurrently with the Arrest Warrants, and upon the same application, are also illegal and Pleads Res Judicata, citing to the Court the recent decision of the Supreme Court of Louisiana in the case of State v. Latil, 92 So. 2, 63; and quoting other decisions. The State, in its argument, admits the hearing in Section E of this Court, admits the determination as regards the validity of the arrest warrant, but denies that there was a determination of the identical, factual and legal issues were involved.

This Court must accept the argument of the defendant and reject that of the State.

On the question of the suppression of the evidence, both the defense and the State have presented this Court with lengthy arguments and briefs. Needless to say, the historic Mapp v. Ohio (367 U. S. 643, 81 S. Ct. 1686, 1961) was cited to the Court by the defendant, along with many, many other citations. Further, in the matter of Marcus, et al. v. The Search Warrant of Property, etc., 367 U. S. 717 the Court found that the authorities in seizing more property than that which was specifically declared in the

warrant acted illegally. This is particularly what took place in this matter presently before this Court; even to the extent that the State has offered to return to the defendant all of the material which they do not consider contraband.

The Court feels that *at least* in view of the two cases cited supra, not to mention other grounds, that the State exceeded its authority in carrying out this search and seizure, and accordingly,

It is ORDERED, ADJUDGED and DECREED that the Motion to Suppress and the Plea of Res Adjudicata herein filed be and the same are hereby Maintained.

JUDGMENT READ, RENDERED and SIGNED IN OPEN COURT THIS 12th day of JUNE 1964.

/s/ George P. Platt
GEORGE P. PLATT,
Judge, Section B.

Clerk's Office, June 15, 1964.
A TRUE COPY

GEO. SMITH, *Deputy Clerk,*
Criminal District Court,
Parish of Orleans.

APPENDIX C

Minute Entry
April 20, 1964
AINSWORTH, J.

No. 13967

CIVIL ACTION

DIVISION D

JAMES A. DOMBROWSKI, *et al.*,

versus

COLONEL THOMAS D. BURBANK, *et al.*

This matter came on for hearing on a former day on motion of defendant, James H. Pfister, to dismiss or, in the alternative, for summary judgment. The court, having heard the argument of counsel and having considered the briefs, affidavits and deposition in support thereof, is now ready to rule.

IT IS ORDERED that motion of defendant, James H. Pfister, to dismiss be, and the same is hereby, DENIED.

REASONS

Mover, a member of the Louisiana Legislature is entitled to absolute immunity under the doctrine of *Tenney* v. *Brandhove*, 341 U. S. 367, 71 S. Ct. 783 (1951), if the affidavits and deposition submitted by the parties indicate that he was acting at the time "in the sphere of legitimate legisla-

tive activity." Here there is a sharp dispute as to the facts upon which we can conclude whether or not the defendant was engaged in permissible legislative activity on the dates when he is alleged to have committed tortious acts against plaintiff. As was said in *Tenney*, supra, "The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive. The present case does not present such a situation." The United States Supreme Court decision was therefore predicated upon the state of facts which it found in the *Tenney* case. Since there is a genuine issue as to material facts, summary judgment is not permissible under Rule 56 of the Federal Rules of Civil Procedure. See National Screen Service Corp. v. Poster Exchange, Inc., 5 Cir. 1962, 305 F. 2d 647. A full trial on the merits is necessary to determine the respective rights of the parties. We express no opinion now as to the facts, beyond stating that they are vigorously disputed between the involved parties.

APPENDIX D

Minute Entry
March 18, 1965
AINSWORTH, J.

No. 13967

CIVIL ACTION

DIVISION D

JAMES A. DOMBROWSKI, *et al.*,

versus

COLONEL THOMAS D. BURBANK, *et al.*

This matter came on for hearing on a former day on motions of defendant, James H. Pfister, to dismiss the complaint against him and for summary judgment in his favor and, alternatively, for an order as authorized by 28 U. S. C. § 1292(b).

The Court, having heard the argument of counsel and having considered the affidavits, deposition and briefs in support thereof and opposed thereto, is now ready to rule.

IT IS ORDERED that the motions of defendant, James H. Pfister, to dismiss the complaint against him and for summary judgment in his favor be, and the same are hereby, DENIED.

IT IS FURTHER ORDERED that the alternative motion for an order as authorized by 28 U. S. C. § 1292(b) be, and the same is hereby, GRANTED.

Appendix D

REASONS

By our minute entry dated April 20, 1964, we denied the motion of defendant, James H. Pfister, to dismiss or, in the alternative, for summary judgment. This motion is a renewal thereof and is denied for substantially the same reasons as are contained in our former ruling. There is no disagreement between the Court and mover as to the law of the case. It is found in *Tenney* v. *Brandhove*, 341 U. S. 367, 71 S. Ct. 783 (1951), where the Court held that a member of a State legislature was entitled to immunity from suit for damages, under the particular facts there submitted. The Supreme Court in *Tenney* said:

> "The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive. The present case does not present such a situation."

As we said in our prior decision, *Tenney* was decided by the Court upon the state of facts which it found, that is, that the complained of acts of the legislator were deemed to be fairly within the province of the Committee's inquiry and, therefore, immune to suit for damages. Here that question is disputed in the most vigorous manner by opposing affidavits submitted by the plaintiff and the deposition of defendant Pfister. In *Norton* v. *McShane*, 5 Cir., 1964, 332 F. 2d 855, the Court granted immunity to certain federal officials growing out of the Ole Miss confrontation because the affidavits submitted by respondents were uncontroverted. That is not true here. Not only are they controverted, but the credibility of the statements of defendant

Pfister is also contested by plaintiff. As was said in plaintiff's memorandum in opposition to the present motions, "This overlooks the significant fact that whereas the affidavits of third party defendants are not controverted, the affidavit of defendant Pfister concerning his lack of participation in the tortious acts complained of *is very much controverted* by his own public statements on the date of the raid, October 4, 1963, to public, press, radio and T.V." Then plaintiff refers to his own affidavit filed herein in March, 1964, in which he attached a transcript of an interview of Mr. Pfister over New Orleans Station WDSU-TV and in which plaintiff alleges that Mr. Pfister made the following statement:

> "Today's operation has been done jointly by the Louisiana State Police and the New Orleans Police Department at our request. This has been a combined operation of substantial complexity and we are very must in debt to these fine police agencies for their splendid work and their splendid cooperation. We particularly commend them for the very efficient and professional manner in which they have handled the mechanics of their raid and the delicate problems arising therefrom. Today's raids have been on the offices and homes of certain key figures and key officers and members of the Southern Conference Educational Fund who have been actively, and probably under Louisiana statutes, illegally, operating a Communist front organization here in the City of New Orleans. The evidence seized in the raids may be subpoenaed by our committee. The federal authorities have taken no official action against this Communist front group despite two separate Congressional committee hearings on its activities. It appears that there is a definite need for legislative action on the state level to cope with

such organizations. The Southern Conference Educational Fund has been operating openly in New Orleans for many years to the intense disgust of most decent citizens who know what the organization really is. Under the guise and the sham of the racial issue, many good and well meaning people have been duped into supporting this Communist-led group. It appears that a substantial amount of material has been obtained. It will take some time for it to be carefully evaluated. The committee plans to hold open hearings on this subject matter in the future. Our committee counsel, Jack N. Rogers, and our committee staff director, Col. Frederick C. Alexander, Jr., both of Baton Rouge, deserve much credit for the extensive investigation and the very intensive planning which necessarily preceded this operation. All of the members of our committee have unanimously concurred in the operations which took place today."

In plaintiff's memorandum of March 1, 1965, he said:

> "In addition, a deposition of Judge Thomas Brahney, recently dismissed by Pfister as a third party defendant, likewise *tends to cast some doubt* on Mr. Pfister's allegation that he knew nothing of the raid prior to the occurrence."

It is clear that plaintiff is attacking the credibility of Mr. Pfister. Whether he has a right to do so can only be determined after a trial of this material issue which is so strongly contested between these two parties. We are unable to do so on the motions before us because a trial court should not on a motion for summary judgment attempt to determine questions of credibility. *Girard* v. *Gill*, 4 Cir., 1958, 261 F. 2d 695; *Blenke Brothers Co.* v.

Ford Motor Company, D. C., N. D. Ind., 1963, 217 F. Supp. 459; *Holdeen* v. *United States*, D. C., S. D. N. Y., 1960, 186 F. Supp. 76; *Buren* v. *Schein*, D. C., E. D. N. Y., 1963, 32 F. R. D. 218; and summary judgment is usually not possible in a conspiracy case such as is alleged here. *Deterjet Corp.* v. *United Aircraft Corp.*, D. C., D. Del., 1962, 211 F. Supp. 348. A summary judgment should only be given when it is quite clear what the truth is, *Koepfle* v. *Garavaglia*, 6 Cir., 1952, 200 F. 2d 191, and should never be entered except where the defendant is entitled to its allowance *beyond all doubt*. *Mitchell* v. *Pilgrim Holiness Church Corp.*, 7 Cir., 1954, 210 F. 2d 879. In passing upon such a motion it is no part of the Court's function to decide issues of fact but solely to determine whether there are issues of fact to be tried. *Hoffman* v. *Babbitt Bros. Trading Co.*, 9 Cir., 1953, 203 F. 2d 636. The standard in passing on a motion for summary judgment is *strict* and it should be granted only when it is *perfectly clear* that no issue of fact is involved. *Clarke* v. *Montgomery Ward & Company*, 4 Cir., 1962, 298 F. 2d 346. It is an *extreme remedy* and should be granted only when the facts are quite clear and any doubt must be resolved against movant. *Gunther* v. *San Diego & Arizona Eastern Railway Co.*, D. C., S. D. Cal., 1961, 192 F. Supp. 882. Where there is the *slightest* doubt as to the facts, the motion should be denied *Dale Hilton, Inc.* v. *Triangle Publications, Inc.*, D. C., S. D. N. Y., 1961, 27 F. R. D. 468. In order for the Court to issue a summary judgment there must be no disputed questions of fact or conflicting inferences to be drawn from undisputed facts which, if settled against the moving party, would allow the plaintiff to recover. *Sheets* v. *Burman*, 5 Cir., 1963, 322 F. 2d 277.

We emphasize that what we say here and what was said in our April 20, 1964 minute entry evidences no opinion by the Court as to the facts involved. The facts are ma-

terial, however, and though the determination as set forth in *Tenney* is narrow because the issue is whether the complained of acts of defendant Pfister may fairly be deemed within the province of the Legislative Committee's inquiry and it must be obvious that there was a usurpation of functions, the present state of the record leaves us no alternative but to deny the motion for summary judgment.

The alternative motion for an order under 28 U.S.C. § 1292(b) is more complicated. Respondent argues that he has an *absolute* immunity under the *Tenney* rule from a suit for damages for acts done in his capacity as a State legislator because he contends that his deposition and the affidavits show that the complained of acts should "fairly be deemed within the province" of the Legislative Committee's inquiry, of which he was Chairman; and as was said in *McShane*, he was acting within the "outer perimeter" of his line of duty as Chairman of the Legislative Committee. We do not read *Tenney* as granting an absolute immunity from all acts of a State legislator. It is our belief that the law of the *Tenney* case requires an examination of the facts to see if the legislator's acts may "fairly be deemed within the province" of legislative activity. Respondent reads McShane also as granting immunity because respondent contends that the deposition and affidavits conclusively show that his acts as a State legislator were within the "outer perimeter" of his line of duty as Chairman of the Legislative Committee. There is involved, therefore, a controlling question of law as to whether there is an absolute legislative immunity under the circumstances here. The difficulty is that the circumstances are disputed and we do not think it possible to resolve them without a trial on the merits. However, the record indicates that respondent Pfister will appeal from our recent dismissal of his third-party complaint against his co-legislator members of the Legislative Committee. We signed a final judgment

in that matter pursuant to Rule 54(b), and the judgment is appealable. In the interest of judicial economy we have granted an order for an interlocutory appeal here in order that the question of law contended for by respondent Pfister may be determined. However, by doing so we do not in any way change our belief that summary judgment is not possible under the circumstances of the record here. A consideration of the appeal from our judgment dismissing Pfister's third-party complaint against his co-legislators will necessarily involve the same issue of law as was raised on the present motions. Thus the granting of an immediate appeal from our present order may materially advance the ultimate termination of the litigation.

APPENDIX E

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22562

JAMES H. PFISTER,

Appellant,

versus

WILLIE P. ARCENEAUX, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

(November 14, 1966.)

Before BROWN, BURGER,* and WISDOM, Circuit Judges.

WISDOM, Circuit Judge: The complaint filed in this action is a by-product of *Dombrowski* v. *Pfister*.[1] Dombrowski grew out of two incidents: (1) an investigation of the Southern Conference Educational Fund by the Louisiana Joint Legislative Committee on Un-American Activities; (2) seizure of the Fund's records and papers and the arrest of several of the Fund's officers following the in-

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* Of the District of Columbia Circuit, sitting by designation.

[1] 380 U. S. 479, 85 S.Ct. 116, 14 L.Ed.2d 22 (1965), *reversing* 227 F. Supp. 556 (E.D.La. 1964).

vestigation. The complaint alleges that the investigation and the raid were part of a conspiracy to deprive them of their constitutional rights in violation of 42 U.S.C. §§ 1981, 1983, and 1985(3). The plaintiffs ask for preventive relief and damages against a number of defendants, including James H. Pfister, the Chairman of the Joint Committee. Pfister filed a third-party complaint against the other members of the Joint Committee, alleging that they were liable to him for all or part of any sum the plaintiffs might recover from him. His theory of the case is that any of his actions giving rise to liability to the plaintiffs were authorized and approved by the entire committee. Both Pfister, in his answer and in a motion for summary judgment, and the third party defendants, in their motions to dismiss and for a summary judgment, raise the defense of legislative immunity. See *United States* v. *Johnson*, 1966, U.S. , S.Ct. , 15 L.Ed.2d 683; *Tenney* v. *Brandhove*, 1951, 341 U. S. 367, 71 S.Ct. 783, 95 L. Ed. 1019. The district judge denied Pfister's motion, but granted the third party defendants' motion for summary judgment. This appeal questions only the judgment in favor of the third party defendants.[2] We reverse.

This case requires that we scrutinize closely the events leading to the summary judgment in favor of the third party defendants. Pfister filed his third party complaint October 1, 1964. December 30, 1964, the third party defendants filed their answer and motion to dismiss, based on the theory of legislative immunity. January 18, 1965, Pfister filed a paper captioned "Opposition . . . to Motions of Third-Party Defendants . . . To Dismiss". The last para-

[2] Both before and after the summary judgment in favor of the other members of the committee, Pfister moved for summary judgment. The denial of these motions is not before the Court at this time. For this reason Pfister's theory that what is sauce for the goose is likewise for the gander is not applicable.

graph of this paper expressly incorporated "in support of said opposition . . . . all of the pleadings, affidavits, depositions, judgments, and minute entries heretofore filed in these proceedings". Ten days later, the third party defendants filed a motion for summary judgment and introduced the affidavits of all of the members of the committee. Although the motion set forth no theory on which the committee members were entitled to summary judgment, the affidavits indicate that the theory was, once again, legislative immunity. March 15, 1965, the district judge granted the summary judgment. In his amended "Reasons" the district judge stated:

> The affidavits show that the activities of third-party defendants were at all times limited to investigating the activities of plaintiffs and to authorizing the Chairman of the Committee [Pfister] to turn over to the District Attorney for the Parish of Orleans the evidence heretofore found as a result of such investigations. [¶] There is no evidence by countervailing affidavit or otherwise of participation by any of the third-party defendants in any of the tortious acts alleged by plaintiffs, nor of any knowledge thereof.

While it is true that Pfister filed no opposition to the motion for summary judgment, he did oppose the preliminary motion to dismiss, and in his "Opposition" incorporated all of the affidavits previously introduced in the case. We have concluded, therefore, that Pfister's "Opposition" to the motion to dismiss should be treated as a response to the motion for summary judgment. The third party defendants' motion to dismiss was incorporated in their answer, and therefore may not be viewed as a motion under Rule 12(b) of the Federal Rules of Civil Procedure. Rule 12(b) provides that any defenses presented by motion

"shall be made before pleading . . .". The motion must, therefore, be taken as a motion for judgment on the pleadings. In this view, the motion to dismiss assumes a very close relationship to the motion for summary judgment. Rule 12(c) provides that a motion for judgment on the pleadings may be treated as a motion for summary judgment when matters outside the pleadings are introduced. Here the motion for summary judgment set forth no ground upon which it should be granted, but was merely a vehicle for the filing of affidavits to support the motion to dismiss and to convert *that motion* into a motion for summary judgment under Rule 12(c). Absent the legal terminology, the motion for summary judgment and the motion to dismiss were very nearly the same thing.

Since Pfister had opposed the motion to dismiss when it was originally filed,[3] there was no reason for him to renew his opposition when the motion reappeared in the form of a motion for summary judgment. Because he had incorporated all of the preceding affidavits, depositions, judgments, and minute entries in his original answer to the motion to dismiss, there was no need for him to file additional material to meet the affidavits of the third party defendants. He was not resting "upon the mere allegations or denials of his pleading",[4] but was relying on the affidavits and other material incorporated in his "Opposition" to the original motion to dismiss. Although it would have been more artful pleading for Pfister to have reintroduced all this material, to require him to do so at the risk of a summary judgment would lead only to a wasteful duplication.

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[3] The district judge did not rule on the motion to dismiss until after the motion for summary judgment and the affidavits had been filed. He then disposed of both motions together.

[4] Fed. R. Civ. Pro. 56(e).

We hold, treating Pfister's "Opposition" as a response to the motion for summary judgment, that the district judge erred in granting the motion.

Among the affidavits incorporated to Pfister's "Opposition" was an affidavit introduced by the plaintiff, James A. Dombrowski. In it Dombrowski declared upon oath that on the day of the raid Pfister made a statement to the press in which he described the purpose and method of carrying out the investigation and said, "All of the members of the committee have unanimously concurred in the operation which took place today." If Pfister did make such a statement, the truth or falsity of the statement will bear on the accuracy of the committee members' affidavits that they did not authorize the raids and in fact knew nothing of them before they were carried out. Resolution of this issue, ie, whether Pfister made such a statement and whether it was accurate has a serious bearing on the question whether Pfister and the other members of the committee were "acting in the sphere of *legitimate* legislative activity",[5] which would entitle them to immunity.[6]

Dombrowski's affidavit and the affidavits of the committee members create a "genuine issue as to . . . [a] material fact." Fed. R. Civ. Pro. 56(c). In such circumstances, summary judgment is not proper. "The moving party has the burden of positively and clearly demonstrating that there is no genuine issue of fact and any doubt as to the existence of such an issue is resolved against him." *National Screen Serv. Corp.* v. *Poster Exchange, Inc.*, 5 Cir. 1962, 305 F. 2d 647, 651; *accord, Poller* v. *Columbia Broadcasting System, Inc.*, 1962, 368 U. S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458.

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[5] Tenney v. Brandhove, 1951, 341 U. S. 367, 376, 71 S.Ct. 783, 95 L. Ed. 1019, 1927. (Emphasis added.)

[6] The district judge relied on this issue of fact and its materiality in denying Pfister's second motion for summary judgment.

Appendix E

Since the affidavits introduced by Pfister in his "Opposition" to the motion to dismiss and those of the other members of the committee raise a genuine issue as to a material fact, the district court's judgment granting the third party defendants' motion for summary judgment must be REVERSED. The case is REMANDED for further proceedings consistent with this opinion.

APPENDIX F

(Affidavit and attachments of Col. Alexander, staff director of Louisiana Joint Committee, filed in *Dombrowski* v. *Burbank* (E.D. La.).

STATE OF LOUISIANA
PARISH OF BATON ROUGE

BEFORE ME, the undersigned authority, personally came and appeared: Col. Frederick B. Alexander, Jr., who, after being first duly sworn, deposed and said:

That since December 1, 1960, he has served as Staff Director of the Joint Legislative Committee on Un-American Activities, created by the Louisiana Legislature.

That in the early part of 1963 the Southern Conference Educational Fund, and certain of its personnel, came under his official scrutiny as Staff Director of said Committee.

As information concerning the Southern Conference Educational Fund and certain of its personnel came to the attention of Affiant, he discussed the matter with Chairman Pfister and various members of the Committee from time to time as he would see them either in his office at the State Capitol or in New Orleans where he sometimes dropped by to confer with Chairman Pfister.

On August 27, 1963, at a full meeting of the Committee, Affiant briefed the Committee completely on the progress of the investigation which had begun and which had been named "Operation Tiptop". At this Committee meeting Affiant was authorized by the Committee to contact officials of the New Orleans Police Department and fully brief them and to enlist their assistance. A photostat of the official minutes of said meeting is attached hereto.

On September 30, 1963 the Joint Legislative Committee was again briefed on evidence which had been accumulated, the legal aspects of the investigation which was now called

"Project 50" and it was recommended to the Committee that the investigation be put in the hands of the police authorities. Affiant briefed the Committee on the procedures of a police search. By motion unanimously passed, your Affiant and the Committee counsel, Jack Rogers, were authorized to carry through the entire operational plan of the investigation which had been fully explained to the Committee, including full cooperation with the police. The Chairman appointed a sub-committee to be in New Orleans on October 4th and 5th, on call.

A copy of the formal minutes of the Committee in which the above information was laid before it is attached hereto, dated October 1, 1963.

The search and seizure complained of by plaintiffs took place on October 4, 1963.

As shown by the attached minutes, your Affiant was duly authorized by the Joint Legislative Committee to cooperate fully with the police authorities in carrying out the operational plan which had been fully explained to the Committee.

In carrying out the instructions of the Committee Affiant took no steps nor any actions that were not authorized by the Committee or which were not fully covered by the legal mandate to the Committee from the Legislature.

/s/ Frederick B. Alexander, Jr.,
Col., U.S.A., Retired.

(Sworn to and subscribed before me this 23 day of March, 1965.)

/s/ James H. Hughes,

Notary Public.

Appendix F

STATE OF LOUISIANA

JOINT LEGISLATIVE COMMITTEE

ON

UN-AMERICAN ACTIVITIES

Sept. 3, 1963

MINUTES OF COMMITTEE MEETING OF AUGUST 27, 1963:

The following members were present: Chairman Pfister, Representatives Willie P. Arceneaux, Dudley A. Bernard and Mike John, Jr.; Senators Cecil R. Blair, Samuel S. Broussard, Jackson B. Davis and Harold Montgomery, and Staff Director Colonel Alexander.

Chairman Pfister called the meeting to order at 10:15 a. m. in the meeting room at the City Club in Baton Rouge.

Reading of the minutes of the previous meeting were dispensed with.

Colonel Alexander briefed the Committee completely on the progress to date of Operation Tip-Top and asked the Committee's permission to brief Chief of Police Giarrusso of New Orleans and Major Trosclair of the New Orleans Police Department on the operation with the intention of enlisting their assistance since the operation would fall under the jurisdiction of the New Orleans Police force. A motion was made by Senator Broussard and seconded by Representative Bernard that this be done and was unanimously passed by the Committee.

Colonel Alexander briefed the Committee on its financial status, and a motion was made by Representative John and seconded by Senator Montgomery to pay all current bills including the outstanding one to the Isaac Detective

Agency for the month of July. Colonel Alexander pointed out to the Committee that Operation Tip-Top would be an expensive one and that the present method of the Budget Committee in giving the Committee its money on a monthly basis would not provide the Committee with sufficient money for Operation Tip-Top. The Committee authorized Colonel Alexander to contact Mr. James Riley of the Division of Administration to point out these facts to him and to request a lump sum of $2,500.00 be given the Committee immediately in addition to the $2,000.00 currently due the Committee on September 1, 1963.

There being no more business the Committee adjourned at 11:45 a. m.

Frederick B. Alexander, Jr.
FREDERICK B. ALEXANDER, JR.
Colonel USA (Ret.)
Staff Director

FBA/L

Appendix F

STATE OF LOUISIANA

JOINT LEGISLATIVE COMMITTEE

ON

UN-AMERICAN ACTIVITIES

Oct. 1, 1963

MINUTES OF COMMITTEE MEETING OF SEPTEMBER 30, 1963 AT 4022 SOUTH RAMSEY DRIVE, BATON ROUGE, LOUISIANA:

The following members were present: Chairman Pfister, Representatives Dudley A. Bernard, Mike John, Jr., and Wolborn Jack; Senators Samuel S. Broussard, Cecil R. Blair and Harold Montgomery; Counsel Rogers and Staff Director Col. Alexander.

Chairman Pfister called the meeting to order at 6:30 p.m.

Counsel Rogers briefed the Committee on all legal aspects of Project 50 (SCEF) with the recommendation that the matter be turned over to the police.

Col. Alexander briefed the Committee on all mechanical operations of the Project 50 (SCEF) investigation.

A motion was made by Rep. Mike John, Jr., and seconded by Representative Dudley Bernard that Col. Alexander and Counsel Rogers be authorized to carry through the entire operational plan of the Project 50 (SCEF) investigation, including full cooperation with the police, as outlined at the meeting. The motion was passed unanimously.

Chairman Pfister appointed a sub-committee to be in New Orleans on October 4 and 5 on call—the committee to

consist of Chairman Pfister, Rep. Mike John, Jr., and Rep. Dudley Bernard.

Chairman Pfister called for a meeting of the entire Committee to be held in the Committee office at 10:00 a.m. on October 8.

There being no further business the meeting was adjourned.

FREDERICK B. ALEXANDER, JR.,
Frederick B. Alexander, Jr.,
Colonel USA (Ret.)
Staff Director.

FBA/L

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 118

JAMES A. DOMBROWSKI AND SOUTHERN CONFERENCE EDUCATIONAL FUND, INC., PETITIONERS

v.

SENATOR JAMES EASTLAND, INDIVIDUALLY AND AS CHAIRMAN OF THE INTERNAL SECURITY SUBCOMMITTEE OF THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE; J. G. SOURWINE, INDIVIDUALLY AND AS COMMITTEE COUNSEL FOR THE INTERNAL SECURITY SUBCOMMITTEE OF THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (R. 100–109) is reported at 358 F. 2d 821. The opinion and orders of the district court (R. 12–15, 17) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1966. The petition for a writ of cer-

tiorari was filed on May 5, 1966, and granted on October 10, 1966 (385 U.S. 812). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on the claim for damages based on respondents' alleged participation in a conspiracy, the district court erred in rendering summary judgment for respondents where the uncontroverted proof was that they had not participated in any conspiracy.

2. Whether the court of appeals erred in holding that, even if respondents had participated in the alleged conspiracy, they would be immune from suit for damages because the only acts purporting to connect them with the alleged conspiracy—the issuance of the subpoenas—were within their authority as legislative officers of the United States.

3. Whether the court below erred in dismissing petitioners' claim for injunctive relief on the ground that an injunction directed to respondents—the Chairman and Chief Counsel of a Subcommittee of the United States Senate—would be ineffective to control the disposition of documents in the possession of the Subcommittee.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Art. I, § 6:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their respec-

tive Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

42 U.S.C. 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. 1985(3):

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in per-

son or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT

By this suit petitioners seek money damages from and an injunction against James O. Eastland, a United States Senator, and J. G. Sourwine, Chief Counsel to a Senate Subcommittee of which Senator Eastland is Chairman. Petitioners' grievance concerns a seizure of their records by officials of the State of Louisiana. This case is founded on petitioners' allegation that Senator Eastland and Chief Counsel Sourwine issued subpoenas of the Subcommittee as a part of a conspiracy with the State officials. The undisputed facts and the prior proceedings are outlined below.

1. *The Facts.* The following facts are established by the uncontradicted affidavits and depositions of record.

Senator Eastland is Chairman of the Senate Committee on the Judiciary and of that Committee's Internal Security Subcommittee; J. G. Sourwine is the Chief Counsel to the Subcommittee. (R. 34–35, 37.) The Subcommittee—which is properly designated as the Subcommittee to Investigate the Admin-

istration of the Internal Security Act and other Internal Security Laws—was created to investigate, among other things, "the extent, nature, and effects of subversive activities in the United States * * *." S. Res. 366, 81st Cong., 2d Sess. (1950).

Petitioners—Southern Conference Educational Fund (SCEF) and Dombrowski, SCEF's Executive Director—have been under Subcommittee scrutiny since 1954. After an investigation of SCEF in that year, the Subcommittee reported (R. 38–39) that SCEF had been established as an adjunct of the Southern Conference for Human Welfare, a communist front organization, and had continued to function after the latter organization had been exposed and finally dissolved.[1]

[1] "The Southern Conference for Human Welfare was conceived, financed, and set up by the Communist Party in 1938 as a mass organization to promote communism throughout the Southern States. Earl Browder, former general secretary of the Communist Party in the United States, in a public hearing, identified the Southern Conference for Human Welfare as one of the Communist Party's 'transmission belts.' Under date of March 29, 1944, the Southern Conference for Human Welfare was cited by the Special Committee on Un-American Activities as a Communist front and, on June 12, 1947, by the Congressional Committee on Un-American Activities as a Communist-front organization 'which seeks to attract southern liberals on the basis of its seeming interest in the problems of the South,' although its 'professed interest in southern welfare is simply an expedient for larger aims serving the Soviet Union and its subservient Communist Party in the United States.'

"The Southern Conference Educational Fund, Inc., was initially an adjunct of the Southern Conference for Human Welfare. After the exposure of the Southern Conference for Human Welfare as a Communist front, it began to wither and was finally dissolved, but the Southern Conference Educational

In 1960, the Legislature of the State of Louisiana established the Joint Legislative Committee on Un-American Activities. That Committee was directed to "study, investigate and analyze," among other things, "the activities of groups and organizations which have as their objectives * * * the overthrow of the [government of the] State of Louisiana, or of the United States by force, violence or other unlawful means [and] all organizations known to be or suspected of being dominated or controlled by a power seeking to impose a foreign political theory upon the government and people of the United States * * *" (R. 68–69). The Louisiana Legislative Committee has, since its creation, "studied, investigated, and analyzed the facts relative to a number of known or suspected subversive organizations operating in the State of Louisiana," including, *inter alia,* SCEF, to which the Committee's attention was directed by the Senate Subcommittee's 1955 report (R. 70).

The Louisiana Committee had been authorized to "cooperate and meet with similar committees

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Fund, Inc., continued. The official paper, the Southern Patriot, which was published by the Southern Conference for Human Welfare, was taken over by the Southern Conference Educational Fund, Inc., which professes the same ostensible purpose.

* * * * *

"Dr. James A. Dombrowski was identified as executive director of the Southern Conference Educational Fund, Inc., who immediately prior to the assumption of his present office, had been administrator of the Southern Conference for Human Welfare. Dr. Dombrowski was identified by a witness as one who, to the witness' certain knowledge, had been a member of the Communist Party. He was also identified by another witness as one who had accepted Communist Party discipline * * *" (R. 38–39).

* * * of the Federal Government" (R. 69). Pursuant to this authorization, on several occasions prior to July 1963, the Committee's counsel, Jack N. Rogers, requested and received from respondent Sourwine, Chief Counsel to the Senate Subcommittee, information relating to matters under investigation by the Louisiana Committee. In July of 1963, Rogers told Sourwine that the Louisiana Committee might subpoena SCEF's records, and promised to advise Sourwine if the Louisiana Committee should thus procure any material of interest to the Senate Subcommittee (R. 39–40, 71).[2]

In August or September of 1963, Rogers called Sourwine to ask whether, if the Louisiana Committee were to subpoena SCEF's records, Sourwine and Benjamin Mandel, Director of Research for the Senate Subcommittee, would help the Louisiana Committee in evaluating the material (R. 71). Sourwine discussed this request with Senator Eastland, who instructed him that he and Mandel might assist in such evaluation if—and only if—the records subpoenaed "should appear to be within the scope of the investigative authority of the Senate Committee * * *" (R. 40). The Senator "emphasized" (R. 40):

> that the Senate Committee had no interest in any debates or activities in which SCEF might have engaged with respect to civil rights or racial matters; that the Committee was interested only in material relating to Communist or Communist-front activities, especially

[2] The Subcommittee had maintained a continuing interest in SCEF. After 1954 the Subcommittee "continu[ed] to maintain a file and to accumulate information which became available" about SCEF. (R. 44.)

Communist infiltration of mass organizations and the financing of Communist fronts.

Neither respondents nor anyone else associated with the Senate Subcommittee heard anything further from the Louisiana officials in regard to this matter until October 4, when Rogers telephoned Sourwine to inform him that the Louisiana Committee had obtained SCEF records which would "be of substantial interest to his sub-committee," and asked that he and Mandel go to Louisiana to help evaluate the material. Sourwine and Mandel acceded to Rogers' request (R. 40, 72–73). It was at this point that Sourwine learned that the Louisiana Committee had obtained the records not by subpoena but by search warrant (R. 47).[3] Prior to October 4, Sourwine had believed at all times that a subpoena would be used.

[3] The Louisiana Committee had concluded that SCEF was violating the Louisiana criminal statutes relating to subversive activities, and it therefore determined to secure the records by search warrants. Petitioners claim the record in the Louisiana litigation (discussed *infra*, p. 12) indicates that this decision was made in August 1963 (prior to Rogers' contact with Sourwine). See Pet. Br. at 136–139. We note, however, that the affidavit on which they rely (Pet. Br. App. F) was made over a year after the entry of the judgment herein. It is undisputed, moreover, that Rogers had told Sourwine that the records would be obtained by subpoena and at no time had mentioned to Sourwine the possibility of proceeding by means of warrants (R. 40, 71). In his affidavit, Rogers stated that "at no time did I inform either Senator Eastland or Mr. Sourwine of the decision to proceed against the SCEF and its officers by way of arrest and search warrants rather than by way of subpoena" (R. 74). Sourwine's uncontradicted testimony was that he "did not know until after the material had been secured that it had not been secured through subpoena" (R. 47).

The circumstances under which the arrest and search war-

In Louisiana, Sourwine ascertained the nature and content of the material seized and concluded that it "did in fact include a substantial quantity of material which would be of interest to the Internal Security Subcommittee * * * in pursuance of its investigative functions and within the limits of the directive which had been given * * * by Senator Eastland" (R. 41). Sourwine communicated his conclusion to Senator Eastland by telephone, recommending that all of the material be subpoenaed from the Louisiana Committee by the Senate Subcommittee. Senator Eastland authorized issuance of the subpoenas (R. 35).

On that day, October 5,[4] Sourwine served upon the State officials subpoenas requiring production of the SCEF records in Washington on October 29.[5] On behalf of the Subcommittee, Sourwine took possession of the material then held by the Louisiana Committee,

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rants were obtained and executed are set out in *Dombrowski* v. *Pfister*, 380 U.S. 479, 487 n. 4. After a preliminary examination of the material which had been seized, the Louisiana Committee subpoenaed the records from the Louisiana State Police.

[4] The subpoenas were dated October 4, rather than October 5. The uncontradicted testimony was that this mis-dating was a stenographic error (R. 33). The typist stated by affidavit that when she typed the subpoenas, on October 5, she copied the descriptions of the material to be subpoenaed from the subpoenas issued by the Louisiana Committee and inadvertently copied the date of October 4 from those subpoenas (R. 82). Her testimony was corroborated by Sourwine (R. 48, 49), Rogers (R. 73) and Willie (R. 80).

[5] The subpoenas served by Sourwine had been signed by Senator Eastland and were filled in pursuant to the Senator's instructions (R. 32). In accordance with the Subcommittee's customary procedure, the subpoenas were issued without prior consideration by the full Subcommittee (R. 34).

and designated the Superintendent of the Louisiana State Police as custodian for the Subcommittee (R. 34, 41, 73). The Louisiana Committee was allowed access to the records pending their removal to Washington (R. 62, 73). Thereafter, following a hearing, and on the basis of the evidence adduced, the Louisiana Committee found that SCEF "was a Communist front organization, and also a subversive organization, aiding and abetting the Communist conspiracy" (R. 73).

On October 25, petitioners secured a Louisiana State court ruling that the warrants of arrest had been issued without probable cause (R. 28). On October 27, petitioners commenced an action in the United States District Court for the Eastern District of Louisiana, against the State officials and Senator Eastland, seeking damages and an injunction restraining the removal of the SCEF records from the State. Senator Eastland was never served in that action. District Judge Ainsworth advised petitioners to notify the defendants that the request for an injunction would be heard on Monday, October 28 (R. 29).

When Senator Eastland received a telegram from petitioners' counsel informing him of these proceedings,[6] he instructed Sourwine to have the records under subpoena immediately transferred from Louisiana to Washington (R. 53–55).[7] By October

[6] The telegram apparently read: "Federal Judge Robert Ainsworth has requested your presence in his office 9:30 a.m., October 28, to discuss an injunction enjoining turning over SCEF and Smith and Walter records to Senator Eastland." (R. 54.)

[7] When his deposition was taken, Sourwine was asked if there

28 the records were on their way to Washington. Pursuant to Subcommittee resolution of November 14, all of the records obtained were photostated for the Subcommittee's use and the originals were returned to the Louisiana Committee (R. 36–37).[8]

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were any connection between the "request for injunction" and the removal of the documents (R. 57–58):

"A. I did not know about a request for an injunction, sir, but certainly I had in my mind—and I imagine Senator Eastland had in his mind—the fact that if there was to be litigation about the documents, nobody should be dragged into it and involved in it except the Committee and the Committee personnel, and that the documents should be taken out of the possession of a custodian who held an official position with the State and might, because he wore two hats, one as head of the State Police and one as custodian for us, become involved in an awkward situation.

"Now I did not discuss this with Senator Eastland, but I admit that I did have that possibility in mind.

* * * * *

"Q. Is it correct that the purpose of the removal of the documents was to put them beyond the jurisdiction of the Federal Judge in New Orleans?

"A. This is correct. The Federal Judge would have had no jurisdiction under any circumstances. They were in the possession of the United States and no Federal court would have had any jurisdiction over them all."

[8] The Subcommittee resolution of November 14 reads (R. 36–37):

"Upon the conclusions of the testimony of the second of two witnesses heard in executive session, the Subcommittee considered and discussed the handling of material subpoenaed from the Joint Legislative Committee on Un-American Activities of the State of Louisiana.

"Present: Senators Eastland, Dodd, Hruska, Dirksen and Scott.

"After discussion, and on motion of Senator Dirksen, it was Ordered that the Chairman be authorized to appoint a Task Force consisting of Senators Eastland, Johnston, Dodd, Hruska and Scott to evaluate the subpoenaed material progressively

We have been advised that the Louisiana Committee has returned all of the original records to petitioners.

2. *Other Proceedings.* On January 29, 1964, petitioners were indicted for violation of the Louisiana anti-subversive statutes; they then moved for, and secured, a State court determination that the records seized from SCEF could not be introduced as evidence because the search warrants, like the arrest warrants, had been issued without probable cause. Pet. Br. App. 118–119.

Petitioners also sought declaratory and injunctive relief to restrain various Louisiana officials from prosecuting or threatening to prosecute them under the Louisiana anti-subversive statutes. In *Dombrowski* v. *Pfister*, 380 U.S. 479, this Court held several Louisi-

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with respect to its value to the Subcommittee's investigation and to make determination from time to time respecting particular papers, documents, or other material to be inserted verbatim in the record of the Subcommittee; that all of the material not clearly irrelevant to the Subcommittee's investigation of Communist activity generally, of Communist front activity, of Communist infiltration of organizations and groups, and/or the source of funds for Communist or Communist front activities be ordered into the Committee's hearing record by reference subject to the later determination of the Task Force respecting particular items which should be entered into the record verbatim; and that all of the original records obtained under the subpoena be photostated for the permanent records of the Subcommittee and, when so photostated, be returned promptly to the possession of the Joint Legislative Committee on Un-American Activities of the State of Louisiana.

"JAMES O. EASTLAND, *Chairman.*

"I consent and agree to the foregoing procedure.

"JOHN L. MCCLELLAN.
"OLIN D. JOHNSTON.
"ROMAN L. HRUSKA."

ana statutory provisions unconstitutional and directed the district court to frame an order (380 U.S. at 497–498):

> restraining prosecution of the pending indictments against the individual appellants, ordering immediate return of all papers and documents seized, and prohibiting further acts enforcing the sections of the Subversive Activities and Communist Control Law here found void on their face. * * *

Meanwhile, petitioners' action for damages proceeded in the federal courts in Louisiana. Since Senator Eastland was never served, the defendants in that action were the State officials allegedly involved in the search—Thomas D. Burbank, Russell R. Willie and James H. Pfister. The district court denied the motions for dismissal and summary judgment filed by Pfister, Chairman of the Joint Legislative Committee. Acknowledging that, under *Tenney* v. *Brandhove*, 341 U.S. 367, Pfister was entitled to absolute immunity for "legitimate legislative activity," the district court was unable to accept Pfister's contention that the acts complained of were "fairly within the province of the Committee's inquiry" because Pfister's affidavits to that effect were controverted and his credibility attacked by defendant. Pet. Br. App. 121–129. Accordingly, the district court concluded, in regard to Pfister, that there were genuine and material issues of fact.

On the other hand, the district court granted Police Superintendent Burbank's motion for dismissal because his uncontroverted affidavit showed that "he took no part personally in any of the activities in connection with the execution of the warrants," not-

withstanding plaintiff's assertion that it was "unthinkable that the conduct of the raids was not with the approval of Colonel Burbank" (R. 98–100).[9]

The district court also dismissed a third-party complaint by which Pfister sought to implead the other members of the Louisiana Committee. That determination, however, was reversed by the Fifth Circuit, which found that affidavits before the court cast doubt on "the accuracy of the committee members' affidavits that they did not authorize the raids and in fact knew nothing of them before they were carried out." Pet. Br. App. 134.

3. *Proceedings Below.* In this, a companion suit to the Louisiana litigation, petitioners sued Senator Eastland and Chief Counsel Sourwine[10] for a half million dollars in damages and for an injunction restraining respondents and "all persons acting in concert with them" from using the SCEF documents and ordering respondents to return the documents and any copies of them to petitioners (R. 10–11). The complaint alleged that respondents Eastland and Sourwine, with the Louisiana officials (R. 4):

> * * * entered into a plan, agreement and conspiracy wilfully and with intent * * * under the color of state law and statutes, to deprive the plaintiffs of the rights, privileges and immunities granted to them as citizens of the

[9] In the same minute entry the district court denied Police Major Willie's motion to dismiss on the ground that there remained "a genuine issue as to material facts in connection with" his activities.

[10] The Louisiana officials were named as defendants but not served with process (R. 12).

> United States by the laws and Constitution of the United States and in particular, the First, Fourth and Fourteenth Amendments thereof.

The arrests and seizures of October 4 were alleged to have been effected "in pursuance of [the] conspiracy." The only factual basis for the conclusory charge of conspiracy on the part of Senator Eastland and Mr. Sourwine was the allegation upon "information and belief" that the issuance of the subpoenas for the Senate Subcommittee was also "in furtherance of the * * * conspiracy * * *" (R. 7).

The district court denied petitioners' motion for a preliminary injunction and dismissed so much of their complaint as sought permanent injunctive relief. Noting that "this Court may not enjoin a Congressional committee from pursuing its activities" (R. 13), the court held that granting the relief sought "would contravene the constitutional requirement of separation of powers and would exceed the jurisdiction of this court" (R. 15). Thereafter, on the basis of uncontroverted affidavits showing that respondents had had nothing to do with the alleged conspiracy, the district court, without opinion, granted respondents' motion for summary judgment (R. 17).

On appeal, the district court's decision was affirmed *per curiam* (per Burger and McGowan, J.J.).[11] With regard to the prayer for injunctive relief, the court of appeals noted that although the complaint alleged that SCEF's records were in the possession of Eastland and Sourwine, the opposing affidavits

[11] Senior Circuit Judge Washington did not participate in the decision (R. 109).

established that the documents were in the possession of the Senate Subcommittee. Since an injunction addressed to Eastland or Sourwine could not affect the Subcommittee's use of the records, the court affirmed the dismissal of the request for injunctive relief because "'a court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of benefit to the plaintiff.'" R. 104–105; *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515, 550.

In affirming the judgment for respondents on the claim for damages, the court of appeals rested on the doctrine of legislative privilege, holding that "the record before the District Court contained unchallenged facts of a nature and scope sufficient to give appellees an immunity against answerability in damages for actions taken in the course of their legislative activities" (R. 105, footnote omitted). Focusing upon "the dangers of inhibiting the legislative process by the threat of personal liability to those engaged in it" (R. 106), the court of appeals held that the Subcommittee's subsequent formal approval of the subpoenas served "to keep appellees' acts in pursuing the Subcommittee's long-standing interest in appellants within the mainstream of legislative effort to a degree adequate to protect against liability in damages for issuing and executing the subpoena" (R. 106–107). The court rejected petitioners' argument that their charge of conspiracy with State officials stripped respondents of their legislative privilege, pointing out that "the conduct of which appellants complain (appellees' activities pursuant to the

subpoena) could not have been undertaken had appellees had no official legislative positions and responsibilities" (R. 108–109, footnote omitted).[12]

SUMMARY OF ARGUMENT

The gravamen of petitioners' complaint is that certain of their records were seized illegally by Louisiana State officials, from whom the records were subpoenaed by the Internal Security Subcommittee of the United States Senate. The primary issues arising out of the seizure have been or are being decided in other litigation. Thus, the propriety of the seizure is not in issue here—the Louisiana State courts have held it invalid, and this Court has enjoined further prosecution of respondents under the Louisiana anti-subversive statutes under color of which the seizure had been made. *Dombrowski* v. *Pfister,* 380 U.S. 479. Similarly, this suit does not concern the liability of the Louisiana State officials to respond in damages for the illegal seizure; that question is being litigated in the federal courts in Louisiana, which have held that all but one of the officials must go to trial on that question.

The only issue in this case is whether, by alleging conspiratorial complicity in the seizure, petitioners may secure damages from and an injunction against the United States Senator and Chief Counsel who

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[12] The court also rejected the argument that respondent Sourwine was not entitled to legislative privilege, relying, *inter alia*, on *Barr* v. *Matteo*, 360 U.S. 564, 572–573 (R. 109, n. 11). Without passing upon the propriety of the summary judgment, the court of appeals noted that it "might have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial" (R. 105).

executed the Senate Subcommittee's subpoenas of the records. We urge that this ancillary suit against the federal legislative officials must fail.

I

Petitioners' claim for damages was based upon respondents' alleged participation in a conspiracy to seize their records. Respondents showed (by deposition and affidavit) that they had had nothing whatever to do with any conspiracy or with the seizure of petitioners' records, and petitioners failed to challenge that showing by affidavit or as otherwise provided by Rule 56 of the Federal Rules of Civil Procedure. Upon this record, therefore, there was no genuine issue of material fact, and the district court properly granted summary judgment. Rule 56(e), Fed. R. Civ. P.

II

Even if the affidavits and depositions were insufficient to warrant summary judgment in a case involving private defendants, respondents were entitled to judgment. For the only factual allegation purporting to connect respondents with the alleged conspiracy was that, as Chairman and Chief Counsel of the Senate Internal Security Subcommittee, they had issued subpoenas directed to the State officials to obtain petitioners' records. But respondents' conduct in issuing the subpoenas was well within the perimeter of their official duties as United States Senator and Chief Counsel. Accordingly, as the court of appeals held,

they are immune from liability for that conduct, under the Speech and Debate Clause of the Constitution (Article I, Section 6) and the doctrine of legislative immunity.

III

Petitioners sought an injunction against Senator Eastland and Chief Counsel Sourwine to prevent the use of the seized records and copies of such records, and to compel return of the records and copies to petitioners. The courts below properly denied this request, since injunctions directed against Eastland and Sourwine would be ineffective to control the disposition of the copies of the records, all of which copies are (and have been) in the possession and control of the Senate Subcommittee.

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR RESPONDENTS, SINCE PETITIONERS FAILED TO CONTROVERT RESPONDENTS' SHOWING THAT THEY HAD NOT PARTICIPATED IN THE ALLEGED CONSPIRACY

Petitioners' complaint alleged generally that respondents and the State officials had "entered into a plan, agreement and conspiracy wilfully and with intent * * *" to deprive petitioners of certain constitutional rights (R. 4). Specifically, petitioners alleged that the searches of October 4 had been undertaken "pursuant to this conspiracy" (R. 4–5) and, on "information and belief," that respondents' issuance of the Senate Subcommittee subpoenas was

"part of the above described conspiracy * * *" (R. 7).

In support of their motion for summary judgment, respondents submitted affidavits which established, in direct contradiction to the allegations of the complaint, that they had no connection with the searches and that their subpoenaing of the records had not been part of any "plan, agreement or conspiracy" with the State officials. Thus, Senator Eastland and Mr. Sourwine each stated under oath (R. 35–36, 43):

> I had nothing whatever to do with the acquisition of the SCEF material by the Louisiana Committee, or with the preparation, issuance, or service of the arrest and search warrants whereunder the Louisiana authorities obtained the material of SCEF which was later subpoenaed by the Senate Internal Security Subcommittee. I deny emphatically that I was party to any conspiracy to obtain and execute such warrants, or to subpoena the material.

Indeed, when deposed by petitioners, Mr. Sourwine revealed that the State officials had never informed him of their plan to acquire SCEF's records by means of search warrant rather than subpoena (R. 47):

> * * * As a matter of fact, I did not know until after the material had been secured that it had not been secured by subpoena.

Respondents also filed affidavits of the State officials responsible for the searches; these confirmed the fact that Senator Eastland and Mr. Sourwine had had no prior knowledge of the State officials' decision to proceed by search and arrest warrants and that re-

spondents had not been parties to any agreement or "conspiracy." Thus, James Pfister, Chairman of the Louisiana Committee, and Major Russell Willie of the Louisiana State Police averred that they had never met nor had any communication with Senator Eastland or Mr. Sourwine until the service on them of the Senate Subcommittee's subpoenas on October 5, 1963 (R. 62–63, 80–81). Similarly, Thomas Burbank, the head of the Louisiana State Police, swore that he had had no communication with Senator Eastland or Mr. Sourwine with respect to any action contemplated or proposed by the State Police or Louisiana Committee (R. 77). And Jack N. Rogers stated that his only contact with either respondent was his request of July 17, 1963 to Mr. Sourwine for certain information from the public records of the Senate, his statement at that time that the Louisiana Committee "might subpoena the records of the SCEF," and his request in mid-September for help in evaluating the material "in the event that the Joint Committee subpoenaed the records" (R. 71). He also made it clear that "at no time did I inform either Senator Eastland or Mr. Sourwine of the decision to proceed against SCEF and its officers by way of arrest and search warrants rather than by way of subpoena" (R. 74). All of the State officials stated flatly and unequivocally that respondents had had nothing to do with the seizure of petitioners' records, and that there was no agreement, concert of action or conspiracy between the State officials and respondents (R. 62–63, 74, 77, 80–81).

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The affidavits filed by petitioners in opposition to respondents' motion for summary judgment asserted no facts controverting the evidence assembled in support of that motion. Indeed, petitioners' affidavits did not even purport to traverse a single statement of fact in the affidavits filed on behalf of respondents. Petitioners' affidavits simply described the searches and arrests (R. 20–31) and raised a question as to whether the Senate Subcommittee's approval of the subpoenas had been unanimous. Although petitioners had available the panoply of discovery procedures afforded by the Federal Rules, they chose only to depose Mr. Sourwine; and his deposition fully confirmed the assertions in the affidavits previously filed. Moreover, petitioners neither impeached the credibility of respondents or their affiants nor stated reasons why they could not "present by affidavit facts essential to justify * * * opposition" to the motion, as required by Rule 56(f), Fed. R. Civ. P.[13]

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[13] At the hearing in March 1964, on respondents' motion for summary judgment, petitioners asked for a continuance to permit discovery procedures relating to a letter sent by former Senator Keating to Senator Eastland.

The district court properly denied that request. Senator Keating's letter had been written on January 30, 1964, and petitioners' counsel were aware, at least as early as February 18, of a newspaper report of the letter on February 6 (R. 30). Since petitioners did not indicate why they had taken no steps to secure an affidavit from Senator Keating in the interim, there was no reason for the district court to grant a continuance of a hearing set for the day of the request.

In any event, Senator Keating's letter—which is set out at p. 26, n. 16, of the Petition for Certiorari, is of no relevance to this case. The letter expressly confirms the fact that the Subcommittee had "ratified this action"—*i.e.*, the subpoenaing

Thus, respondents' showing that they had not participated in any agreement, concert of action or conspiracy with regard to the searches—and, specifically, that their subpoenaing of the records had not been pursuant to any such agreement or conspiracy—was uncontradicted and unchallenged save by the allegations of the complaint. Respondents, therefore, were entitled to summary judgment under Rule 56(e), Fed. R. Civ. P.:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Erickson v. *United States,* 340 F. 2d 512 (C.A. 5).[14]

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of SCEF's records. Acknowledging that other members of the Subcommittee had "approved" the subpoenas, Senator Keating objected to the fact that he did not have an opportunity to express his dissent. His objection has no relevance here.

[14] It would be peculiarly inappropriate to permit the allegations of petitioners' complaint to contravene the sworn affidavits submitted in behalf of respondents since the complaint does not satisfy the requirement of Rule 56(e) that "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The complaint in this suit was verified by Walter Dillon, an attorney for petitioners, who admitted that his verification had been made on the basis of information furnished by other attorneys and the affidavits of Messrs. Dombrowski and Brener (R. 96). Rule 56 does not permit consideration of such a complaint, verified by counsel "who obviously did not have personal knowledge of most of

We emphasize that, although petitioners' suit was founded on respondents' alleged participation in an alleged conspiracy, the complaint contained nothing but the bare conclusory allegation of respondents' participation. In contrast, respondents' motion for summary judgment was supported not with "naked denials" (Pet. Br. 96), but with affirmative recitals of the facts surrounding the incidents upon which petitioners' suit was based. The affidavits of all the persons who had knowledge of the facts conclusively showed that neither Senator Eastland nor Mr. Sourwine had had anything to do with the actions of the Louisiana Joint Legislative Committee in obtaining petitioners' records. Petitioners were unable to make any showing to the contrary and accordingly were not entitled to a trial of fact.[15]

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the things that he referred to, and whose testimony would not have been admissible in evidence at the trial." *Hoston* v. *J. R. Watkins Co.*, 300 F. 2d 869, 870 (C.A. 9). Insofar as the complaint rested on "information and belief", it is of course insufficient under Rule 56.

We do not, as petitioners suggest (Pet. Br. 96), ask this Court to "overturn" any "conclusion" of the court of appeals. The court of appeals found it unnecessary to reach the question of whether the record would have warranted summary judgment, apart from considerations of legislative immunity (R. 105).

[15] With their motion for summary judgment, respondents submitted a Statement of Material Facts Pursuant to Local Rule 9(h) (R. 83–94). Since petitioners did not submit the countervailing "statement of genuine issues" provided for by Rule 9(h), the district court was entitled to "assume that the facts as claimed by the moving party [were] admitted to exist

Respondents' "detailed affidavits, categorically denying the existence of such a conspiracy * * * were sufficient to require the plaintiffs to 'set forth specific facts showing that there is a genuine issue for trial' under the recent amendments to Rule 56(e) * * *." *Scolnick* v. *Lefkowitz,* 329 F. 2d 716, 717 (C.A. 2). Petitioners failed to controvert respondents' showing in any respect. Their affidavits did not traverse respondents' affidavits. They did not—as they had in the Louisiana litigation [16]—cast any doubt on the credibility of respondents or their supporting affiants. Given the opportunity, by discovery, to develop facts which would show the existence of a triable issue, they deposed Mr. Sourwine and failed to develop anything but further substantiation of respondents' position. See *Lundeen* v. *Cordner,* 356 F. 2d 169 (C.A. 8); *Orvis* v. *Brickman,* 196 F. 2d 762, 766 (C.A.D.C.), affirming 95 F. Supp. 605. Petitioners' only response to respondents' showing was an assertion that the facts *which respondents had adduced* supported an inference of conspiracy. But petitioners make this showing only by restating, with critical omissions, the facts which respondents did prove. They suggest, for example, that an inference of con-

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without controversy * * *." Respondent's Statement recited (R. 93):

"Neither Senator James O. Eastland nor Mr. J. G. Sourwine had anything whatsoever to do with the acquisition of the SCEF material by the Joint Committee of the Louisiana Legislature or with the preparation, issuance or execution of the arrest and search warrants whereunder the Louisiana authorities obtained the material of SCEF which was later subpoenaed by the Senate Internal Security Subcommittee."

[16] See Pet. Br. App. 134.

spiracy may be raised by the fact of "private" discussions between Sourwine and Rogers (Pet. Br. 97); but no such inference is raised by the fact of discussions in which Rogers asked Sourwine for information regarding SCEF and informed Sourwine that the Louisiana Committee intended to subpoena SCEF's records (R. 71). Nothing in respondents' recital of the facts is inconsistent with the avowals that they had nothing to do with any agreement or conspiracy regarding petitioners. Petitioners say (Pet. Br. 104) they find "incredible" respondents' proof that they had no prior knowledge of the October 4 searches. Petitioners' expression of disbelief does not constitute a form of proof."

The short of the matter is that respondents have shown that the conspiracy upon which the suit is based does not exist. Petitioners have not adduced any evidence casting any doubt upon that showing, and have not demonstrated any possibility of their being able to cast doubt upon it at trial. "'[A]n opposing party who has no countervailing evidence and who cannot show that any will be available at the trial [is not] entitled to a denial of the motion for summary judgment on the basis of a hope that such evidence will develop at the trial.'" *International Longshoremen's and Warehousemen's Union* v. *Kuntz*, 334 F. 2d 165, 169, n. 5 (C.A. 9), quoting 6 Moore's *Federal Practice* ¶ 56.15[3], pp. 2129–2130

[1] Compare the dismissal of the Louisiana suit against Superintendent Burbank in the face of petitioners' contention that it was "unthinkable that the conduct of the raids was not with the approval of Colonel Burbank" (R. 100).

(1953). Denial of respondents' motion for summary judgment on this record would have frustrated "[t]he very mission of the summary judgment procedure [, which] is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." [18] Rule 56(e) does not "derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary." [19] On the record before the district court, there was no "genuine issue" as to respondents' participation in the conspiracy; therefore, the district court properly granted summary judgment for the respondents. See *S & S Logging Co.* v. *Barker,* 366 F. 2d 617, 623 (C.A. 9); *Chafin* v. *Pratt,* 358 F. 2d 349, 354 (C.A. 5); *Norton* v. *McShane,* 332 F. 2d 855, 861 (C.A. 5), certiorari denied, 380 U.S. 981; *Preble* v. *Johnson,* 275 F. 2d 275, 279 (C.A. 10); *Dyer* v. *MacDougall,* 201 F. 2d 265, 269 (C.A. 2).

II. THE ONLY CONDUCT OF RESPONDENTS OF WHICH APPELLANTS COMPLAIN—THE ISSUANCE OF SENATE SUBPOENAS—WAS WELL WITHIN THE PERIMETER OF RESPONDENTS' OFFICIAL DUTIES; ACCORDINGLY, THE DOCTRINE OF LEGISLATIVE IMMUNITY PROTECTS THEM FROM LIABILITY IN DAMAGES

As argued above, we think the district court was correct in rendering summary judgment for respondents,

[18] Notes of Advisory Committee on Rules, reproduced as notes to 28 U.S.C.A., Fed. R. Civ. P. 56 (1966 Cumulative Supp.).

[19] *Ibid.*

since their uncontradicted affidavits show that they did not participate in any concert of action, agreement or conspiracy with the State officials. Accordingly, in our view the Court need not reach the issue of legislative immunity. *Peters* v. *Hobby,* 349 U.S. 331, 338; *Communist Party* v. *Catherwood,* 367 U.S. 389. If, however, the Court believes it necessary or appropriate to reach that issue, we submit that the court of appeals correctly held that, on the uncontroverted facts of record, the doctrine of legislative immunity precludes liability for damages here. For, as the court of appeals recognized, the only part that respondents allegedly played in the alleged conspiracy was their issuance of subpeonas of the Senate Internal Security Subcommittee for SCEF's records. Since this conduct was well within the scope of their official duties, we show here, the Speech and Debate Clause of the Constitution and the doctrine of legislative immunity preclude the imposition of liability for damages based upon that conduct.

1. Article I, Section 6, of the Constitution (*supra,* pp. 2–3) directs that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." This legislative privilege is designed not for the protection of the legislators personally, "'but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal.'" *Kilbourn* v. *Thompson,* 103 U.S. 168, 203 (quoting *Coffin* v. *Coffin,* 4 Mass. 1, 27); *Tenney* v. *Brandhove,* 341 U.S. 367, 373–374; cf. *Bond* v. *Floyd,* 35 U.S. Law Week 4038, 4043 (Dec. 5, 1966). As this Court noted last Term, "Since

the Glorious Revolution in Britain and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature." *United States* v. *Johnson,* 383 U.S. 169, 178. Although the doctrine of legislative immunity thus has its roots in the express language of the Constitution, the underlying considerations are the same as those that gave rise to the judicially formulated doctrines of immunity for those associated with the judicial process (*e.g., Bradley* v. *Fisher,* 13 Wall. 335; *Yaselli* v. *Goff,* 12 F. 2d 396 (C.A. 2), affirmed *per curiam,* 275 U.S. 503) and to officers of the Executive Branch (*e.g., Spalding* v. *Vilas,* 161 U.S. 483; *Barr* v. *Matteo,* 360 U.S. 564).

Only three suits involving legislative immunity have reached this Court, and in each of the three the Court has upheld the privilege and admonished that it be construed "liberally, that the full design of it may be answered." *Kilbourn* v. *Thompson, supra,* 103 U.S. at 203; *Tenney* v. *Brandhove, supra,* 341 U.S. at 373–374; *United States* v. *Johnson, supra,* 383 U.S. at 180.

The immunity from civil or criminal prosecution attaches not only to speech or debate as such but also "to things generally done in a session of the House by one of its members in relation to the business before it" (*Kilbourn* v. *Thompson, supra,* at 204). In particular, the immunity applies to resolutions offered, to the act of voting, to written reports presented in the legislature by its committees (*ibid.*) and to investigations by standing or special committees of the legislature (*Tenney* v. *Brandhove, supra,* at 377–

378). Allegations or proof of conspiracy cannot deprive the legislator of his immunity from civil and criminal prosecution for legislative activities. *United States* v. *Johnson, supra.* It also is settled that this legislative immunity applies to suits, like this one, brought under the Civil Rights Act, alleging a conspiracy by two or more persons to deprive another of constitutional rights, for Congress did not intend by that Act to "subject legislators to civil liability for acts done within the sphere of legislative activity." *Tenney* v. *Brandhove, supra,* at 376.[20]

Thus, petitioners' suit here is barred by the doctrine of legislative privilege unless respondents' conduct was "of an extraordinary character," (*Kilbourn* v. *Thompson, supra,* at 204), outside the "sphere of legislative activity" (*Tenney* v. *Brandhove, supra,* at 376).[21]

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[20] To be sure, as petitioners urge, the antecedents of the Speech or Debate Clause were, as this Court said in *Johnson*, designed to protect legislators against an overbearing executive—the then-current threat to legislative integrity. But the language of the clause, like its spirit, calls equally for protection of legislators from private persons who would invoke the aid of the judiciary in controlling the conduct of the legislature. The crucial question is whether a judge may properly impose sanctions on legislators for the conduct of their legislative functions. See Yankwich, *The Immunity of Congressional Speech*, 99 U. Pa. L. Rev. 960, 966. Accord, *Tenney* v. *Brandhove*, 341 U.S. 367.

[21] The Court indicated, in *Kilbourn* v. *Thompson*, the sort of "extraordinary" conduct "for which the members who take part in the act may be held legally responsible":

"* * * If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow the

2. The test of whether conduct is protected by the doctrine of legislative immunity obviously is not whether that conduct was legal or illegal, for a suit against a member of Congress will always be based upon an allegation that he has committed an illegal act. Nor will an allegation that the conduct was unconstitutional, or in furtherance of a conspiracy, suffice to strip away the immunity. See *e.g., Tenney* v. *Brandhove, supra,* at 369; *United States* v. *Johnson, supra.* Similarly, the legislator's motives or purposes are irrelevant to the application of the privilege. For example, in *Tenney* v. *Brandhove, supra,* at 377, this Court ruled:

> The claim of an unworthy purpose does not destroy the privilege. * * * The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher* v. *Peck,* 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. * * *

Accord, *United States* v. *Johnson, supra,* at 180.

The test is simply whether the act is such as is "generally done in a session of the House by one of

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example of the French Assembly in assuming the function of a court for capital punishment we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate." 103 U.S. at 204–205.

its members in relation to the business before it" (*Kilbourn* v. *Thompson, supra,* at 204), or whether the legislators "were acting in a field where legislators traditionally have power to act" (*Tenney* v. *Brandhove, supra,* at 379). A legislator loses immunity only for conduct "that is in no wise related to the due functioning of the legislative process." *United States* v. *Johnson, supra,* at 172.

Plainly, Senator Eastland's conduct was well within the "sphere of legitimate legislative activity." The only fact alleged in the complaint to tie him to the conspiracy was his authorization of the issuance of subpoenas for documents which his Subcommittee's Chief Counsel had advised were relevant to the Subcommittee's inquiry. As this Court has recognized, "Investigations, whether by standing or special committees, are an established part of representative government." *Tenney* v. *Brandhove, supra,* at 377. And a legislator's conduct in regard to such investigations is protected by immunity, at least unless it is "obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive." *Id.,* at 378.

Senator Eastland's authorization of the issuance of the subpoenas here was well within the traditional power of a chairman of a Senate subcommittee. Indeed, the issuance of subpoenas by the chairman is expressly authorized by the Rules of the Internal Security Subcommittees of the Judiciary Committee of the United States Senate, which provide:

> Subpoenas for attendance of witnesses and the production of memoranda, documents, and records shall be issued by the subcommittee chair-

> man or by any other member of the subcommittee designated by him.[22]

This Subcommittee rule implements S. Res. 366, 81st Cong., 2d Sess. (1950), which provides (Sec. 2):

> * * * Subpoenas shall be issued by the chairman of the committee or the subcommittee, and may be served by any person designated by such chairman.[23]

Petitioners contend that the doctrine of legislative immunity should not apply here because the issuance of the subpoenas upon the instructions of the Chairman had not been authorized by the full Subcommittee (Pet. Br. 70–73). In appeals from convictions for contempt of Congress, the Court of Appeals for the District of Columbia Circuit has twice held, subsequent to the issuance of the subpoenas here, that Senate Resolution 366 requires the entire Subcommittee, rather than simply the Chairman, to decide who shall be subpoenaed. *Shelton* v. *United States,* 327 F. 2d 601 (C.A.D.C. 1963); *Liveright* v. *United States,* 347 F. 2d 473 (C.A.D.C. 1965). But this Court need not decide whether the Subcommittee could properly delegate to its Chairman that function, as it apparently attempted to do in its Rules. For it is clear that the sphere of valid legislative activity is substantially narrower than the sphere of legislators' personal immunity. *Kilbourn* v. *Thompson,* 103 U.S. 168; *Tenney* v. *Brandhove,* 341 U.S. 367, 379 (concurring opinion of Mr. Justice Black). Thus, even if (as petitioners contend) the subpoenas were invalid

[22] Rules of Procedure, Rule 2, adopted by the Subcommittee on February 7, 1955, reprinted in the Subcommittee's *Rules of Procedure and Information for Witnesses*, p. 5.

[23] Reprinted in the Subcommittee's Rules, *supra*, pp. v–vi.

for failure to comply with a procedure that has since been held necessary for authorization, it by no means follows that issuance of the subpoenas was so far outside the "mainstream of legislative authority" that petitioners can recover money damages from respondents for their mistaken belief that the Subcommittee practice was valid. As the court below said, construing its own prior holdings, entirely different questions are presented in suits against officers for damages than in proceedings for contempt of Congress (R. 105–106):

> * * * *Shelton*, however, held only that a person compelled to testify before a Senate Subcommittee by an invalid subpoena could not be convicted of contempt for failing to respond to the Subcommittee's questions. No necessity existed there for considering the dangers of inhibiting the legislative process by the threat of personal liability to those engaged in it. These are at the core of the public policies reflected in the immunity doctrine.

Indeed, in *Yellin* v. *United States*, 374 U.S. 109, 121–122, this Court emphasized this very distinction, holding that a recusant witness may challenge a committee's breach of its rules in defending against a contempt citation, although that witness "has no opportunity to recover in damages, U.S. Const., Art. I, § 6; *Kilbourn* v. *Thompson*, 103 U.S. 168, 201–205."

In addition, in this case the full Subcommittee subsequently ratified the issuance of the subpoenas on the authority and signature of the Chairman (R. 36–37). This action showed that the Chairman was in fact acting on behalf of the Subcommittee when he issued

the subpoenas. And since the Subcommittee as a whole concededly was competent to issue the subpoenas, the action of the Chairman in issuing them was clearly within the perimeter of his official duties (R. 106–107).[24]

There can be, we submit, no legitimate doubt that Senator Eastland's authorization of the issuance of the Subcommittee subpoenas, and his direction that the subpoenas be implemented, were well within the "sphere of legitimate legislative activity" and that the doctrine of legislative immunity therefore precludes making that conduct the basis of this claim for damages.[25]

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[24] As the court below pointed out, this ratification might not be effective for all purposes (cf. *Shelton* v. *United States*, *supra*, 327 F. 2d at 607), but it is effective to show that respondents' conduct was not outside their legislative duties. Cf. *Gojack* v. *United States*, 384 U.S. 702, emphasizing that prior authorization under a House Committee's rules is essential in the context of a criminal case. Refusing to pass on "the appropriateness of this procedure as a method of conducting congressional business," this Court emphasized that its concern was with "the administration of criminal justice, and specifically the application of the criminal statute which has been invoked" (384 U.S. at 714).

[25] As we have noted above, the only factual allegation in the complaint tying Senator Eastland to the alleged conspiracy was the issuance of the subpoenas (R. 6–7, 2–12). Nor, as we have shown above (*supra*, pp. 19–22), was there any other evidence of record connecting the Senator to the alleged conspiracy. Accordingly, there is no material issue of fact—apart from the issuance of the subpoenas—which would warrant a trial, and petitioners err in suggesting that there are such issues (Pet. Br. 70, n. 63). If, as required by *United States* v. *Johnson*, 383 U.S. 169, the conspiracy alleged in the complaint is purged of elements offensive to the Speech or Debate Clause, there are no factual allegations left to link the respondents here to that conspiracy.

3. As with Senator Eastland, the only facts alleged in the complaint purporting to link Mr. Sourwine with the alleged conspiracy pertain to his part in issuing the subpoenas and securing the documents for the use of the Senate Subcommittee (R. 6–7). Mr. Sourwine, Chief Counsel to the Subcommittee, advised the Chairman that, in his opinion, the records of SCEF included material which would be of interest to the Subcommittee and recommended the issuance of the subpoenas (R. 41). In addition, he had the subpoenas filled in, and served them, pursuant to the Chairman's instructions (R. 41). Again under the Chairman's order, he took possession of the material for the Subcommittee, and later directed the custodian of the records to have them transported to Washington by the return date. Since this conduct was undertaken as part of his duties as Chief Counsel to the Subcommittee (see R. 60), he too is, as the court of appeals held, immune from suit for damages.

In our view, Chief Counsel Sourwine's conduct, within the scope of his duties as an employee and agent of the Senate, is protected by the Speech or Debate Clause. Since Mr. Sourwine was acting for Senator Eastland and the Subcommittee, his privilege derives from theirs. In conducting investigations within the sphere of its legitimate legislative function, Congress necessarily acts through its agents, and an agent, acting within the scope of his authority, should share in the Subcommittee's privilege. Cf. *Fowler* v. *Southern Bell Telephone and Telegraph Co.*, 343 F. 2d 150, 156–157 (C.A. 5).

Kilbourn v. *Thompson, supra,* does not bar application of the legislative privilege to agents of the legislature. In that case, the conduct of the Sergeant-at-Arms was held to be subject to suit for damages because, in attempting to effect an arrest to punish a contumacious witness, he was purporting to perform a judicial function and thus implement congressional conduct which was "outside its legislative role." *Tenney* v. *Brandhove, supra,* 341 U.S. at 377.

In this case, by contrast, the issuance of the subpoenas clearly was within the sphere of the legitimate legislative activities of the Senate and of its Subcommittee.[26] The subpoenas were, moreover, issued in conformity with the Subcommittee's rules, and in accordance with its usual practice (R. 34). Thus, Mr. Sourwine's conduct in filling out and serving the subpoenas was well within the sphere of legitimate legislative activity. Similarly, his actions in looking at the material, determining that it was of interest to the Subcommittee, and recommending that it be subpoenaed were within the normal limits of the duties of a Chief Counsel, and well within the sphere of legitimate legislative activity.

It seems clear that legislative immunity should apply to legislative officials, as well as to the legislators themselves. While none of the three decisions of this Court involving such immunity has so held, the opinion in *Tenney* v. *Brandhove, supra,* 341 U.S. at 378, clearly suggests this result:

[26] The only question as to the validity of the subpoenas was whether the Subcommittee was required to vote on each individual subpoena, or whether it could have and had delegated that function to its Chairman.

> Legislative privilege in such a case [where the defendants are members of a legislature] deserves greater respect than where an official acting on behalf of the legislature is sued or the legislature seeks the affirmative aid of the courts to assert a privilege.[27]

The same considerations which have led the courts to extend the doctrines of judicial immunity and official (executive) immunity to subordinate officials of the Judicial and Executive branches counsel application of the rule of legislative immunity to officials of the legislature.[28] Since legislative committees and individual legislators, like judges and heads of Execu-

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[27] *Stockdale* v. *Hansard*, 9 AD. & E. 1, 112 Eng. Reports 1112 (1839), upon which petitioners so heavily rely, is to the same effect: it deprives a legislative agent of legislative privilege only insofar as he is acting outside the legislative sphere. In any event, the decision in *Stockdale* v. *Hansard*, denying the parliamentary privilege to one who privately published papers on parliamentary orders, was overturned by Act of Parliament the very next year. 3 & 4 Vict., c. 9 (1840).

[28] The "traditional arguments in support of immunity" were outlined in *Bauers* v. *Heisel*, 361 F. 2d 581, 590 n. 9 (C.A. 3): "'* * * (1) the danger of influencing public officials by threat of a law suit; (2) the deterrent effect of potential liability on men who are considering entering public life; (3) the drain on the valuable time of the official caused by insubstantial suits [which would require inordinate private record keeping, Bradley v. Fisher, 80 U.S. (13 Wall.) at 349]; (4) the unfairness of subjecting officials to liability for the acts of their subordinates; (5) the theory that the official owes a duty to the public and not to the individual; (6) the feeling that the ballot and the formal removal proceeding are more appropriate ways to enforce honesty and efficiency of public officers.'"

Note, 66 Harv. L. Rev. 1285, 1295 n. 54 (1953). See also Judge Learned Hand's classic explanation in *Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (C.A. 2), certiorari denied, 339 U.S. 949, which was adopted by this Court in *Barr* v. *Matteo*, *supra*, 360 U.S. at 571–572.

tive departments, are able to fulfill their duties only with the assistance of counselors and agents, those assistants, like subordinate executive officers and those associated with the judiciary,[29] should share their superiors' immunity. *E.g. Barr* v. *Matteo,* 360 U.S. 564. Neither the officer's rank nor his motivation affects the applicability of the law of privilege. The test is whether the acts complained of have "more or less connection with the general matters committed by law to [the officer's] control or supervision, [and are not] manifestly or palpably beyond his authority," and that the acts are pursuant to "a decision which it is necessary that these officers be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability." *Spalding* v. *Vilas,* 161 U.S. 483; *Yaselli* v. *Goff,* 12 F. 2d 396 (C.A. 2), affirmed *per curiam,* 275 U.S. 503; *Barr* v. *Matteo,* 360 U.S. 564; *Norton* v. *McShane,* 332 F. 2d 855, 859, 862 (C.A. 5), certiorari denied, 380 U.S. 981; *Ove Gustavsson Contracting Co.* v. *Floete,* 299 F. 2d 655, 659 (C.A. 2), certiorari denied, 374 U.S. 827; *Gregoire* v. *Biddle,* 177 F. 2d 579, 581 (C.A. 2), certiorari denied, 339 U.S. 949.

Application of these settled criteria to the facts of this case make it plain that Sourwine's conduct is immune from suit for damages. In communicating to

[29] It is for similar reasons that prosecutors are held to partake of judicial immunity: "The reasons are clear: his primary responsibility is essentially judicial * * *; his office is vested with a vast quantum of discretion which is necessary for the vindication of the public interest." *Bauers* v. *Heisel,* 361 F. 2d 581, 589–590 (C.A. 3); see *Yaselli* v. *Goff,* 12 F. 2d 396 (C.A. 2), affirmed *per curiam,* 275 U.S. 503.

Senator Eastland his advice that the SCEF records would be of interest to the Senate Subcommittee "in pursuance of its investigative functions" (R. 41), and in carrying out the Chairman's instructions with regard to the subpoenas, which were in apparent accord with the Subcommittee rules and usual practice, Sourwine was acting with regard to matters generally committed to his discretion and control as Chief Counsel to the Senate Subcommittee (see R. 60). Clearly, he did nothing "manifestly or palpably beyond his authority." For this conduct, therefore, he is immune from civil liability. *Barr* v. *Matteo, supra*.[30]

[30] We think it clear that the doctrine of immunity protects federal officials from suits under the Civil Rights Act as well as from suits founded on common law causes of action, as was held in *Gibson* v. *Reynolds*, 172 F. 2d 95 (C.A. 8), certiorari denied, 337 U.S. 925. Compare *S & S Logging Co.* v. *Barker*, 366 F. 2d 617, 622 (C.A. 9), holding the doctrine applicable in a suit founded on the antitrust laws. Although the Civil Rights Act was designed for use against State officials, it has been held that State legislators (*Tenney* v. *Brandhove*, *supra*) and State judges and quasi-judicial officers (*e.g.*, *Bauers* v. *Heisel*, 361 F. 2d 581 (C.A. 3)) can raise the defense of immunity in Civil Rights Act cases; it would, plainly, be anomalous to deny that defense to federal officers. Cf. *Francis* v. *Crafts*, 203 F. 2d 809, 812 (C.A. 1), certiorari denied, 346 U.S. 835, where the court said:

"Certainly it would be absurd to hold, in the application to the Civil Rights Act, that judicial officers of a state stand in any less favorable position than do state legislators, in respect to immunity for civil liability for the acts done in their official capacity."

Since State legislators are immune from Civil Rights Act suits, *a fortiori* federal legislators, and federal legislative officials, like Mr. Sourwine, have the same immunity. This immunity was well established, both in England and in the United States, before enactment of the Civil Rights Act. Congress did not intend by that enactment to abolish the long standing privilege. Cf. *Tenney* v. *Brandhove*, *supra*.

Petitioner's contention (Pet. Br. 70–73) that Sourwine's service of the subpoenas was outside his authority and therefore unprivileged is based upon a misreading of *Wheeldin* v. *Wheeler,* 373 U.S. 647. In that case, there were two petitioners, Wheeldin and Dawson. As to Wheeldin, who had been subpoenaed on the authority of the Committee Chairman (Pet. Br. 72–73, n. 65; Br. for Resp. in *Wheeldin,* p. 23, n. 20), the Solicitor General did argue that Wheeler was immune from suit. Br. for Resp. in *Wheeldin,* pp. 23–30. Wheeldin's motion for leave to withdraw his petition for certiorari was granted by this Court when it decided the case. 373 U.S. at 648, n. 1. Also to petitioner Dawson, the Solicitor General conceded that the dismissal of the complaint could not be upheld on the doctrine of official immunity only because "Dawson's complaint, which must be construed most favorably to the plaintiff, can be read to allege that no member of the Committee even attempted to delegate the Committee's subpoena power to Wheeler" (Br. for Resp. in *Wheeldin,* p. 31). Such, of course, is not the situation here, where the Chairman signed the subpoenas, and Sourwine acted pursuant to his express authority and directions and in apparent accord with the Subcommittee rules and usual practice. See, *supra,* pp. 32–34.

III. THE COURT BELOW PROPERLY REFUSED TO ISSUE AN INEFFECTIVE INJUNCTION ATTEMPTING TO CONTROL RESPONDENTS' CONDUCT WITH RESPECT TO MATERIAL NOT IN THEIR POSSESSION

Petitioners sought preliminary and permanent injunctions restraining respondents from "using"

SCEF's records, and compelling them to return the records (and all copies thereof) to petitioners. In response to the application for preliminary relief, respondents filed affidavits which established that the originals of the records were being returned to the persons from whom they had been subpoenaed, and that neither the originals nor the copies of the records were, or had ever been, in their personal possession, but were and had been in the "custody, possession and control" of the Senate Internal Security Subcommittee.[31] These affidavits were corroborated by a formal resolution whereby the Subcommittee "incorporated the documents in its hearing record and made express provision for their examination and disposition by the collective act of the Subcommittee" (R. 103).

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[31] Senator Eastland's affidavit reads, in pertinent part (R. 35):

"I do not now have in my personal possession nor have I ever had in my personal possession either in the District of Columbia, or in the State of Mississippi or anywhere else, any of the documents, records or articles referred to in the complaint.

"All such documents, records and articles, excepting those which have been returned to the Joint Legislative Committee on Un-American Activities of the State of Louisiana from which they were subpoenaed by the Subcommittee on Internal Security are now in the custody, possession and control of the Internal Security Subcommittee of the Committee on the Judiciary of the United States Senate and are being evaluated pursuant to the resolution adopted by the Subcommittee, November 14, 1963, a copy of which resolution is attached hereto and made part hereof as Exhibit A."

Chief Counsel Sourwine's affidavit reads, in pertinent part (R. 41–43):

"Immediately following the service of the subpoenas duces tecum on October 5, 1963, I took possession, on behalf of the Senate Internal Security Subcommittee, of all the SCEF material then in the hands of the Louisiana State Committee. I

The courts below properly refused to issue an injunction requiring respondents to return the copies of

arranged with Colonel Thomas D. Burbank, Superintendent of the Louisiana State Police, for him to hold this material as custodian for the Senate Committee. Subsequently, two staff members of the Internal Security Subcommittee brought the material to the Committee's offices in Washington, D.C.

"* * * It soon became apparent that there was a substantial quantity of material which could not reasonably be expected to be of any value to the Senate Subcommittee in its investigations. This material was promptly prepared for shipment and returned to the Louisiana Committee, being shipped on November 8, 1963.

"On November 14, 1963, the Internal Security Subcommittee formally considered the matter of evaluation and disposition of the material secured under subpoena from the Louisiana Committee, and approved a resolution ordering that all the material be placed in the Subcommittee's record by reference, that it be photostated as speedily as possible, that upon completion of photostating the originals be returned to the Louisiana Committee, and that a task force of five Senators undertake the work of evaluating the material to determine which items should be placed in the record verbatim. * * *

"Work under this resolution is proceeding, and it is anticipated that additional material will be shipped back to the Louisiana Committee each week until all of the material obtained under the subpoena has been returned.

"The material in the possession of the Senate Internal Security Subcommittee relating to the Southern Conference Educational Fund, Inc., is being studied, evaluated, and used by that Subcommittee pursuant to its duty to make a complete and continuing study and investigation of the extent, nature, and effect of subversive activities in the United States and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement. The material is directly relevant to these matters. The material relates not only to the activities and personnel of the Southern Conference Educational Fund, Inc., but also to the connections between that organization and other organizations which appear to be Communist, Communist dominated, or Communist-front organizations, such for example as the Fair Play for Cuba Committee."

the records to petitioners.[22] For those copies are in the possession of the Subcommittee, and respondents could not effect their return to petitioners. A court will not require a person to do what it is not in his power to do. See *Two Guys* v. *McGinley,* 366 U.S. 582, 588; *Z. & F. Assets Realization Corp.* v. *Hull,* 31 F. Supp. 371 (D. D.C.), affirmed, 114 F. 2d 464 (C.A.D.C.), affirmed, 311 U.S. 470; *Citizens Protective League* v. *Clark,* 155 F. 2d 290, 292 (C.A.D.C.), certiorari denied, 329 U.S. 787; *Schwimmer* v. *United States,* 232 F. 2d 866, 868 (C.A. 8), certiorari denied, 352 U.S. 833. The decree petitioners seek, which would expend itself on the Subcommittee's agent and member, cannot grant the relief desired because it cannot prevent the Subcommittee from implementing its resolution concerning SCEF's records. See *Williams* v. *Fanning,* 332 U.S. 490, 494; *Hynes* v. *Grimes,* 337 U.S. 86, 96; *Blackmar* v. *Guerre,* 342 U.S. 512.

Similarly, insofar as petitioners sought to restrain respondents from disclosing the contents of the records, their complaint fails because the records are open to the Subcommittee. As the court of appeals pointed out, "Disclosure of the documents in the course of the Subcommittee's official action would not be prevented by the decree prayed for against appellees; and all other members of the Subcommittee would still have unfettered use of the documents" (R. 104). In this regard, too, the court below properly followed the established rule "that a court of equity may refuse

[22] Since the original records have been returned (*supra*, p. 12), all that is in issue here is the propriety of requiring respondents to return the copies of the records—which were made at the direction and for the use of the Subcommittee.

to give any relief when it is apparent that that which it can give will not be effective or of benefit to the plaintiff." *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515, 550. Petitioners may desire a useless injunction, but it is not the function of a court to gratify such wishes. It long has been settled that useless injunctions will not issue. Spelling, *Injunctions* (1926), states the familiar rule (p. 107):

> Whatever the merits of the applicant's case, as shown in his complaint or other initial presentation, it may appear wholly impracticable to aid him by injunction, for one or more of a variety of reasons of circumstance, environment or condition. And inasmuch as vain acts are in the same category as erroneous action, courts will in such case refuse to grant the process. * * *

So much petitioners appear to concede (Pet. Br. 109–110). To circumvent their difficulty, they make two arguments (Pet. Br. 108–110): *first,* that the district court should not have considered the affidavits showing that the records in issue were in the possession of the Subcommittee, and, *second,* that even if this fact was properly taken into account, the district court should have held a hearing to determine whether issuance of an injunction against respondents would have been futile. Neither of these contentions is meritorious.

1. There was no reason for the district court to close its eyes to the affidavits' showing that those whose control of the documents petitioners sought to enjoin did not have control of the documents—that the records were in fact in the "custody, possession and con-

trol of the Internal Security Subcommittee" (R. 35). Citing *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480, petitioners argue that the court should have ignored the affidavits and considered only their complaint, which was "all that was properly before [the court] on the motion to dismiss * * *" (Pet. Br. 108). Petitioners' argument is beside the point. The district court was not considering a motion to dismiss—it was considering petitioners' motion for a preliminary injunction and respondents' opposition thereto.[33] It is settled that in ruling on a prayer for a preliminary injunction "the court may receive and consider both affidavits and other documents which are the equivalent of affidavits." *United States* v. *Fox*, 211 F. Supp. 25, 30 (E.D. La.); *Andrews* v. *Chesapeake and Pot. Telephone Co.*, 89 F. Supp. 176, 177 (D. D.C.); 7 Moore's *Federal Practice* ¶65.04[3]. "[A] preliminary injunction may not issue without giving the party sought to be enjoined an opportunity to present evidence on his behalf * * *." *Sims* v. *Greene*, 161 F. 2d 87, 88–89 (C.A. 3); *Carpenters' District Council* v. *Cicci*, 261 F. 2d 5, 8 (C.A. 6).

It was entirely appropriate for the court, having determined that petitioners could not support their application for an injunction, to dismiss finally that portion of the complaint which sought permanent injunctive relief. "[I]f the bill be obviously devoid

[33] See the district court docket entries (R. 97). Respondents' motion for dismissal was not filed until January 28, 1964, more than a month after the district court, on consideration of the motion for and opposition to issuance of a preliminary injunction, had dismissed that portion of the complaint which sought injunctive relief.

of equity upon its face, and such invalidity be incapable of remedy by amendment * * * we know of no reason why, to save a protracted litigation, the court may not order the bill to be dismissed." *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U.S. 485, 495; *Standard Oil Co. of Texas* v. *Lopeno Gas Co.*, 240 F. 2d 504, 510 (C.A. 5).[34]

2. There was no need for the district court to hold a hearing to determine whether issuance of an injunction would have been futile. Undisputed affidavits are sufficient to support denial of a request for injunctive relief. Evidentiary hearings on motions for preliminary injunctions are appropriate only where necessary "to resolve material conflicts in affidavits * * *." *Ross-Whitney Corp.* v. *Smith Kline & French Lab.*, 207 F. 2d 190, 198 (C.A. 9); compare *Carpenters' District Council* v. *Cicci*, 261 F. 2d 5, 8 (C.A. 6), and *Sims* v. *Greene*, 161 F. 2d 87, 88–89 (C.A. 3).[35] In this case, however, there was no basis for hearing, for there

[34] In *Mast, Foos* this Court recognized that dismissal of a bill can be supported by affidavits. 177 U.S. at 495.

[35] *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515, restates the established rule "that a court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of benefit to the plaintiff." 300 U.S. at 550. That decision does not, as petitioner would have it, require that a hearing be held before a court may do so. The Court's opinion simply points out that "Whether the decree will prove so useless as to lead a court to refuse to give it, is a matter of judgment to be exercised with reference to the special circumstances of each case * * *" (*id.*, at 551); nothing in the decision suggests that where, as here, the "special circumstances" of the case are clear from the affidavits, the court nonetheless must hold a hearing upon the propriety of issuing an injunction.

was no conflict. Respondents' affidavits and the Subcommittee resolution established beyond the possibility of doubt that the records in question were in the custody of the Senate Subcommittee—that, indeed, they never had been in the personal possession of the respondents. Petitioners did not in any way traverse that showing.[36] Even now petitioners do not deny that the records are in the Subcommittee's possession. Since the undisputed affidavits showed that the records were beyond the reach of the respondents, there was no reason for the district court to hold a hearing.

Petitioners have not—even at this point—given any indication that there were "material conflicts" which should have been resolved at a hearing. Petitioners suggest that they should have been afforded a hearing in order to litigate "whether the individual respondents retained copies of the seized documents * * * and whether they had given these copies to other individuals throughout the country" (Pet. Br. 110). There is, however, no need to litigate that issue, for the affidavits show that the only copies of SCEF's documents were made by the Senate Subcommittee pursuant to its resolution of November 14, 1963 (see *supra*, 42–43, n. 31), and are in the Subcom-

[36] Insofar as the complaint rested on petitioners' "information and belief," it plainly was inadequate to contravene respondents' affidavits. An "application for a preliminary injunction cannot be based on information and belief, but must be based on facts * * *." *Bowles* v. *Montgomery Ward & Co.*, 143 F. 2d 38, 42 (C.A. 7). In any event, it is clear on the record that the SCEF's records were at all pertinent times in the Subcommittee's custody, certainly after its November 14 resolution, which was adopted before respondents were served with petitioners' motion for a preliminary injunction.

mittee's possession (R. 35). Moreover, petitioners had an opportunity to explore these questions at Sourwine's deposition but apparently developed no relevant information.

In sum, the Subcommittee has had exclusive possession of the records; it alone can dispose of them. Petitioners have not sued the Subcommittee, and they cannot enjoin respondents' control over the documents since respondents do not have, and have not had, any such control.[37] For these reasons, the court below correctly sustained the district court's dismissal of petitioners' claim for injunctive relief.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted.

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ROGER ROBB.

JANUARY 1967.

[37] Petitioners could not have sued the Committee to govern its disposition of SCEF's records. See *Hearst* v. *Black*, 87 F. 2d 68, 71–72 (C.A.D.C.); *Mins* v. *McCarthy*, 209 F. 2d 307 (C.A.D.C.); *Fischler* v. *McCarthy*, 117 F. Supp. 643, 648–650 (S.D.N.Y.) (dictum), affirmed on other grounds, 218 F. 2d 164 (C.A. 2); *Methodist Federation for Social Action* v. *Eastland*, 141 F. Supp. 729 (three-judge district court, D.C.); *Pauling* v. *Eastland*, 288 F. 2d 126, 130 (C.A.D.C.), certiorari denied, 364 U.S. 900.

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October Term, 1966

No. 118

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Petitioners,

against

SENATOR JAMES EASTLAND, individually and as Chairman of the Internal Security Subcommittee of the Judiciary Committee of the United States Senate; J. G. SOURWINE, individually and as Committee counsel for the Internal Security Subcommittee of the Judiciary Committee of the United States Senate,
Respondents.

PETITIONERS' REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

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1. After the filing of the petition for writ of certiorari in this case the Court granted a petition for writ of certiorari in *Pierson* v. *Ray*, # 1074, 1155 October Term, 1965 U. S. , (May 16, 1966, 86 S. Ct. 1457). In *Pierson* the Court has now accepted for review certain important and substantial questions relating to the impact of the doctrine of immunity upon suits for damages brought under the Civil Rights Acts. These questions are similar to the important issues raised in the present petition. We respectfully suggest that the same considerations which led to the granting of certiorari in *Pierson* call for the granting of the petition here. The Court may desire to set this cause for argument together with *Pierson*.

2. In addition to these issues of importance involved in both *Pierson* and the present petition, aspects of the impact of the immunity doctrine upon civil rights damage actions are presented uniquely in this petition which ought to be considered by the Court together with the questions raised in *Pierson*. Consideration of the questions presented in this petition would thus bring to the Court, in addition to the *Pierson* issues, critical questions relating to the scope and extent of both legislative and executive immunity to civil rights damage actions.

3. The respondents in their Answer to the Petition seek to avoid acknowledging that this case raises fundamental questions of the scope and extent of the immunity doctrine. Thus their formulation of the questions presented inexplicably omits the issue of immunity deemed determinative by the Court of Appeals and suggests rather that the question is really whether summary judgment for the respondents was proper where the "affidavits showed that they [the respondents] did not participate in the conspiracy". Brief for Respondents in Opposition p. 2.* But the respondents fail to account for the fact that the Court of Appeals has already adversely disposed of this contention and has held that with regard to respondents' charged participation in the conspiracy, in the absence of considerations of "legislative immunity . . . we might have considerable difficulty in concluding that there were no disputed issues of fact requiring exploration and resolution by means of a trial" (Pet. App. 5a).

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* Respondents also suggest as a second question presented the propriety of denying injunctive relief on the ground that such relief would be "ineffective" under the doctrine of this Court's opinion in *Virginia Railway* v. *System Federation No. 40*, 300 U. S. 515 (1937). As we have pointed out in the petition under *Virginia Railway* equitable considerations of futility come into play only after a hearing which discloses the "special circumstances of each case", 330 U. S. at 551. Not only was no hearing held on the request for equitable relief, but the matter was disposed of summarily by the district judge on unilateral assertions by the respondents.

Respondents' only acknowledgment of the clear opinion of the Court of Appeals, that this record presents disputed issues of fact "requiring exploration and resolution by means of a trial," appears in a footnote to their Answer. Respondents Brief in Opposition, footnote 4, pp. 10, 11. In order to avoid conceding that this case raises fundamental issues of the scope of legislative immunity, respondents would inferentially ask this Court to wholly disregard the conclusion of the lower court that the questions of respondents' participation in the charged conspiracy "require resolution by means of a trial" (Pet. App. 5a). Even if this question were properly before the Court on this petition the extraordinary nature of the facts revealed in the record support beyond any possible question the conclusion of the Court of Appeals.*

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* The following facts emerge from the complaint, affidavits and depositions upon which the Court of Appeals based its decision that there were "disputed issues of fact requiring exploration and resolution by means of a trial":

(a) the meetings of Respondent Sourwine and Mr. Rogers, the Louisiana Committee counsel, in the summer of 1963, at which the records, lists and files of SCEF were discussed (Deposition of Sourwine, pp. 21-25).

(b) the illegal raids, searches and seizures on the afternoon of October 4th, 1963, conducted on warrants issued without probable cause in which Rogers and Pfister played a prominent role, and during which the very records, lists and files discussed in the summer meetings with Respondent Sourwine were illegally seized (18a, 19a, 20a. All references are to the printed joint appendix in the Court of Appeals and to the depositions on file in this case.)

(c) the close proximity in time between the illegal raids during which the records and files were seized and the phone call to Respondent Sourwine, sometime the evening of the same day, informing him that Rogers and Pfister now had the records and files in their possession (Deposition of Sourwine, p. 32).

(d) the issuance of purported subpoenas by the respondents for these illegally seized records and files on the very day of the illegal raids, October 4th. [Respondents contend this was a

4. The recent decision of this Court in *Gojack* v. *United States* — U. S. —, 86 S. Ct. 1689 (1966) further underscores the importance of the issues presented in this petition. Respondents seek to invoke the protective mantle of legislative immunity by relying upon the assertion that all of their conduct was immunized by the issuance of the subpoenas signed in blank of October 4th and respondent Eastland's activity in directing the midnight removal of the seized property on October 24th. However, the respondents now concede, Respondents' Brief, at p. 8, that "the subpoena directed to petitioners' property—and the removal of that property from Louisiana to Washington—had not been authorized by the Subcommittee". But this Court has only recently held in *Gojack*, "No committee of either the House or Senate, *and no Senator and no Representative is free on its or his own to conduct investigations unless authorized*" 86 S. Ct.

"secretarial error" and that the subpoenas should have read "October 5th".] (35a, 36a) It is of some interest that all of the subpoenas made out by appellees bear the same "secretarial error", October 4th, on their face, as well as the letter sent by Respondent Sourwine to a Louisiana police official designating him as "Custodian" of the seized material (36a).

(e) the appearance of Respondent Sourwine in Baton Rouge, Louisiana, the morning after the illegal raids, prepared with blank subpoenas signed in advance by Respondent Eastland (35a, 36a).

(f) the failure of respondents to obtain Subcommittee authorization for these purported subpoenas or for their actions in Louisiana (35a, 36a).

(g) the telephone call of Respondent Eastland to Respondent Sourwine the night before the hearing scheduled in New Orleans, Louisiana, before Federal District Judge Ainsworth, instructing Sourwine to arrange to have the seized materials removed from Louisiana, and the subsequent telephone call from Respondent Sourwine to Louisiana officials sometime late Sunday evening to arrange the midnight transportation of the seized materials across the state boundaries to Woodville, Mississippi (29a).

(h) the letter of Senator Kenneth B. Keating to Respondent Eastland indicating that at least one member of the Subcommittee had no knowledge whatever of these activities (33a).

at p. 1698 (emphasis added). After the clear words of this court in *Gojack* it is impossible to support a contention that the acts of the respondents were "within the scope of [their] duties for the Senate Subcommittee", or "within the mainstream of legislative effort" [Pet. App. 6a, 7a].*

CONCLUSION

The petition for writ of certiorari ought to be granted and the judgments below reversed.

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* It is of some interest that respondents fail completely to explain why at a minimum Respondent Sourwine is not judicially accountable in the action for damages under this Court's decision in *Kilbourn* v. *Thompson*, 103 U. S. 168. See Petition, Point 7, Reasons for Granting the Writ, at p. 30.

Certificate of Service

I hereby certify that a copy of the foregoing Reply to Brief for Respondents in Opposition was mailed, by United States mail, postage prepaid, to the office of Honorable Thurgood Marshall, Solicitor-General; John W. Douglas, Assistant Attorney-General; David L. Rose and Martin Jacobs, Attorneys, U. S. Department of Justice, Washington, D. C. 20530, this 14th day of September, 1966.

.....